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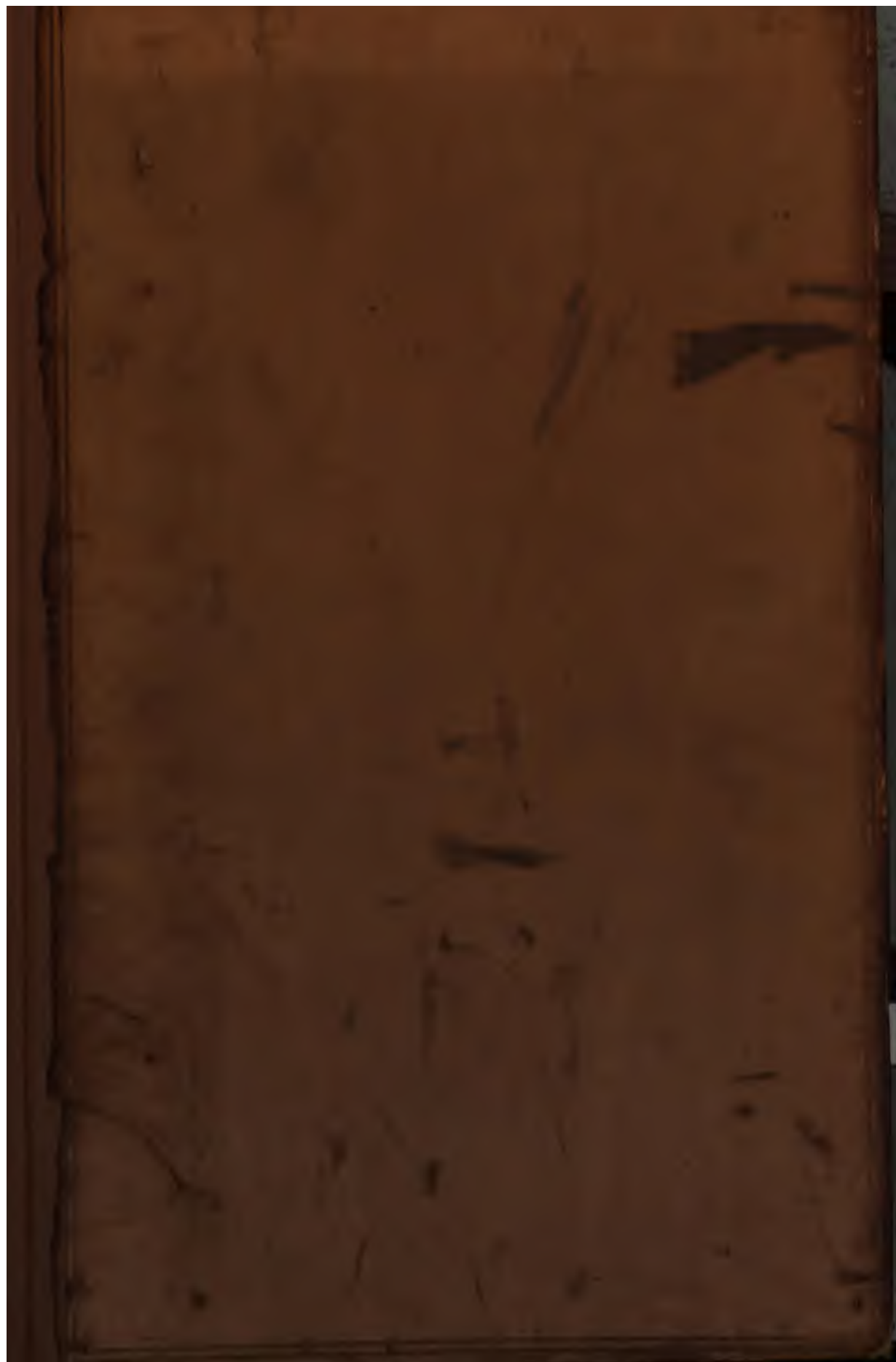
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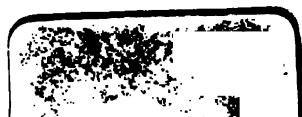
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R E P O R T S
OF
C A S E S
ARGUED AND DETERMINED
IN THE
Ecclesiastical Courts
AT
Doctors Commons;
AND IN THE
HIGH COURT OF DELEGATES.



By JOSEPH PHILLIMORE, LL. D.
ADVOCATE IN DOCTORS' COMMONS, CHANCELLOR OF THE DIOCESE OF OXFORD,
AND REGIUS PROFESSOR OF CIVIL LAW IN THE UNIVERSITY OF OXFORD.

*Vixere fortes ante Agamemnona
Multi: sed omnes illacrymabiles
Urgentur, ignotique longa
Nocte, carent quia vate sacro.*

HOR.

VOL. III.

**CONTAINING CASES FROM TRINITY TERM 1818, TO MICHAELMAS TERM
1821, INCLUSIVE.**

LONDON:
JOSEPH BUTTERWORTH AND SON, 43, FLEET STREET.
1827.

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ADVERTISEMENT.

SINCE the publication of the Second Volume of this Work, the Reports of several cases decided by Lord Stowell in the Consistory Court of London, have been published by Dr. Haggard, and amongst them are five cases which had appeared in the earlier Volumes of these Reports. The Editor, therefore, feels that he owes it to himself to put the public in possession of the exact degree of authenticity to which his (the first-published) Reports of these cases are entitled. The cases are, *Pouget v. Tomkins*, (Vol. I. p. 499.) *Waring v. Waring*, (Vol. II. p. 132.) *Harris v. Harris*, (Vol. II. p. 111.) *Wakefield v. Mackay*, (Vol. I. p. 134.) *Greenstreet v. Cumyns*, (Vol. II. p. 110.) Of these

the three first were at the particular request of Lord STOWELL, submitted to his (Lord STOWELL's) revision before they were published, and severally underwent repeated and elaborate correction from his hand, as the manuscript and the proof sheets now in the Editor's possession most abundantly testify. The fourth, that of *Wakefield v. Mackay*, was read over by Lord STOWELL with the Editor after it had appeared in print, and approved of by him. The fifth, that of *Greenstreet v. Cumyns*, is almost a literal transcript from the judgment as it was printed in the Second Volume of this Work.

In the present Volume two cases will be found which have been reported by Dr. Haggard, *viz.* that of *Gilbert v. Buzzard and Boyer*, (p. 335.) and that of *Briggs v. Morgan*, (p. 325.) The judgment in the former case is taken from a copy corrected by Lord STOWELL and circulated in print soon after it was delivered; and the Report has, besides, the advantage of being prefaced by the arguments of the leading counsel on each side;—the latter, from the personal share the Editor had in the cause, may be relied upon as an accurate statement, as well of the arguments of Counsel as of the decisions of the Judge.

The Editor takes this opportunity of acknowledging his obligations to the learned Judge who presides over the Arches, and Prerogative Courts (Sir JOHN NICHOLL) who throughout the course of this laborious Work has been uniformly ready and willing, not only to supply the Editor with the notes of his judgments, but to render every assistance within his power which could contribute to the value and authenticity of these Reports.



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ERRATA.

Page 11	line	3 for "permanent" read <i>personal</i> .
30	—	1 for "cast" read <i>least</i> .
60	—	26 between "Earl" and "Pembroke" insert <i>of</i> .
70	—	— for "constitution" read <i>constitutions</i> .
152	note, line	27 for "infirmamdam" read <i>informandum</i> .
189	note, line	3 for "Hencham" read <i>Henchmen</i> .
205	line	1 for "an" read <i>and</i> . •
221	—	13 for "libel" read <i>allegation</i> .
223	margin, line	1 for "cites" read <i>lies</i> .
235	line	for "was" read <i>does</i> .
326	—	4 for "woman" read <i>man</i> .
382	margin, line	1 for "Wist" read <i>West</i> .
434	line	4 for "and" read <i>versus</i> .
463	—	21 for "pronounce" read <i>presume</i> .
490	—	19 for "allegation" read <i>alteration</i> .
491	—	8 between "for" and "two" insert <i>after</i> .
577	margin, line	60 between "appearance" and "a" insert <i>in</i> .
608	—	21 <i>dele</i> "the weight of."
640	note, line	9 for "Reddem" read <i>Maddern</i> .

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

ECCLESIASTICAL COURTS

AT

Doctors' Commons;

AND IN THE

HIGH COURT OF DELEGATES.

PREROGATIVE COURT OF CANTERBURY.

SATTERTHWAITE v. SATTERTHWAITE.

1818.
Trinity
Term.
June 10.

JOHNS SATTERTHWAITE, of Lancaster, died in 1808, leaving a widow, a son who had just attained his majority, and several children who were minors—his will bore date 20th of May, 1797; and a codicil in the hand-writing of the deceased, was found in an iron bookcase where he usually kept his papers of moment and concern, of which the following is a copy.

Probate granted in 1808, of an imperfect codicil, revoked.

“Whereas, I the above named John Satterthwaite have, by my above written will
“and testament, bearing date the twentieth
“day of May, one thousand seven hundred

1818.
Trinity
Term.

 SATTER-
 THWAITE
 v.
 SATTER-
 THWAITE.

“ and ninety-seven, constituted and appointed
 “ my brother-in-law Joseph Rawlins one of
 “ the trustees and executors of my said will,
 “ and he being about to go to the West Indies.
 “ Now I do by this writing, which I order to
 “ be received and taken as a codicil to my
 “ said last will and testament, declare that the
 “ said Joseph Rawlins shall not be a trustee
 “ or an executor of my said will, but that
 “ of

“ in the county of shall be a
 “ trustee and executor in the room and place
 “ of the said Joseph Rawlins, and that the
 “ said shall have and be
 “ seized of all the estates, trusts, powers, and
 “ authorities as trustee and executor thereof,
 “ as if he had been originally named therein,
 “ instead of the said Joseph Rawlins; and the
 “ authority of the said Joseph Rawlins shall
 “ from hence be at an end.

“ I also order and direct that all sums of
 “ money already charged, or hereafter to be
 “ charged in my own hand-writing in my
 “ ledger to the debit of any of my children,
 “ shall be considered an advancement to them
 “ respectively, and shall be deducted from their
 “ portions respectively. I hereby confirm my
 “ said will in all other respects, and direct this
 “ codicil to be taken as part thereof. As
 “ witness my hand and seal the
 “ day of , in the year one thousand
 “ eight hundred and .

“ Signed, sealed, published, and declared,

“ by the said John Satterthwaite, as a
 “ codicil to his said will, in the presence
 “ of us,

JOHN SATTERTHWAITE.”

On the 21st of April, 1808, probate both of the will of the 20th May, 1797, and of this testamentary paper, was granted by the Consistory Court at Lancaster, to the executors named in the will, upon affidavit made by one person to the hand-writing of the codicil; and the original papers were deposited in the registry of that Court. On the 21st of April, probate was granted to the same executor by the Prerogative Court of Canterbury, upon an office copy being exhibited of the will and codicil, and of the affidavit of hand-writing deposited in the registry at Lancaster.

On the 4th of January, 1817, a citation issued from the Prerogative Court of Canterbury, at the instance of Rawlins Satterthwaite the son, and one of the residuary legatees of the deceased, against the executors calling upon them to bring in the probate, heretofore granted under the authority of this court, and to prove the codicil by witnesses in solemn form of law, or to shew cause why probate of the will should not be granted to them without the codicil.

The probate was brought in, and the codicil was propounded by the executors, and extracts from the deceased's ledger were exhibited, to shew that he had made advances to his eldest son, which it was contended might be considered as deductions from his share of his father's estate.

Swabey and Gostling in support of the codicil.

1818.
Trinity
Term.
 SATTERTHWAITE
 v.
 SATTERTHWAITE

1818.
Trinity
Term.

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SATTER-  
THWAITE  
v.  
SATTER-  
THWAITE.

*Phillimore and Lushington contra.*

JUDGMENT.

Sir JOHN NICHOLL.

The party is called upon to prove a codicil in solemn form of law—he has propounded, and undertaken to prove it;—a question has been made whether the party proceeding has not barred himself by his long acquiescence from objecting to the validity of the paper;—but if he had any ground of this kind to bring forward, he should have appeared under protest.

The case comes on upon the answers of the party, which deny all the facts pleaded in the allegation in support of the paper.—It is true there may be difficulties,—whose fault is this, but that of the party who has taken the probate without propounding the instrument? If evidence has been lost, it is owing to his own mode of proceeding.—All that I can decide upon the answers is, that it is an imperfect paper;—its leading object seems to have been the appointment of an executor and a trustee;—another object was that of directing certain monies advanced to his children to be taken as a part of their respective portions;—there is an attestation clause, but there are no witnesses to it.—It is impossible to hold this to be any thing but an imperfect paper;—it is alleged that it was found within the will,—that fact is denied.—I think upon the face of the instrument it was never intended to be executed, it is only a draft of something which was intended to be copied over on the will itself;—the expressions,—*I the above named*—the *above written will*—most manifestly shew it to have been a

mere draft ;—he does not fill up the blanks or date it, or copy it on the will ;—it was not his intention to execute this paper, he had subscribed it either inadvertently, or else to authenticate his approbation of it as a draft ;—this may be conjectural, but the law presumes it.—The party setting it up must satisfy the Court, that it was the intention of the deceased that it should operate in its present shape : it would require very strong evidence to satisfy me of this ; neither its substance nor its form was complete.—The presumption is that it was an abandoned paper—the answers, so far from admitting any intention in its favour, state that the deceased had abandoned it, and explain that it was written under feelings of irritation which were afterwards removed.

Under these circumstances the case is beyond all doubt, and I pronounce against the paper.

1818.  
*Trinity*  
*Term.*

SATTER-  
THWAITE  
v.  
SATTER-  
THWAITE.

## HIGH COURT OF DELEGATES.

1818.  
Trinity  
Term.  
June 18.

DUNN v. DUNN.

(*An appeal from the Arches Court of Canterbury*.)

The conduct  
of a husband  
not such as to  
bar his right  
to be divorced  
from his wife  
on account of  
her adultery.

**THE** Judges who sat under this Commission  
were,

Mr. Justice ABBOTT,  
Mr. Justice BURROUGH,  
Mr. Baron GARROW,  
Dr. ARNOLD,  
Dr. COOTE,  
Dr. PARSON, and  
Dr. Jesse ADDAMS.

The cause was heard on the same evidence as  
had been adduced in the court below.

*Dr. Swabey, Dr. Dodson, and Mr. Peake, for  
Mrs. Dunn.*

We do not deny so much the evidence of the  
adultery: but we contend that the husband is to

make proof of it in such manner as not at the same time to implicate himself.—He is not to have his remedy unless he comes into Court with clean hands ; —the pleadings lead to the consideration of the conduct of the husband ;—it amounts to a condonation of the adultery ;—he receives his wife at Dover with facility, there was no inquiry into her conduct, his behaviour has a tendency to encourage the adultery which it has been contended took place. It has been said, the husband has forgiven upon contrition, but where is the proof of any contrition ?—his conduct leads to encourage a repetition of the crime ;—if the injury done to the complainant is owing to his own conduct, he is not entitled to his remedy. It would encourage immorality were it otherwise, and this was the ground of the judgment of the Court below.

*Mr. Warren contra.*

The arguments on the other side seems to infer a connivance of the husband ; if the Court is satisfied that there was such, he is not entitled to his divorce ;—we contend, however, that there is no proof of connivance, though there may be proof of abundance of folly on the part of the husband ;—there is no previous connivance, the elopement does not appear occasioned by his act or negligence.—I rely on Mrs. Papp's evidence to the sixth article.

Grant says, she desired him not to tell her husband that Clay was with her at Calais ; this is important, as shewing that there was no connivance : we contend this is what she told her husband. Suppose she said she had never been with Clay ;—

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*Trinity*  
*Term.*

*Dunn*  
*v.*  
*Dunn.*



# CASES DETERMINED IN THE

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Trinity  
Term.

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v.  
DUNN.

there was no reason in desiring Grant not to tell it. The mother never speaks to him on the subject afterwards; he stops her;—it is plain it was not the conversation of contrition;—it must have been that she was not with Clay. She writes to her sister that she was innocent;—if she represented herself as innocent, there was no case for contrition. The mother tells nothing to the husband.

*Per Curiam.*—Mr. Baron GARROW.

For the best reason because the husband stops her.

*Per Curiam.*—Mr. Justice ABBOTT.

Suppose the adultery proved, and that it was easily forgiven, shew the legal consequence.

*Mr. Warren.*

I will put first an extreme case;—a young man and woman married;—adultery committed and forgiven;—that there is adultery again;—he is entitled to his remedy.—Condonation, if there is subsequent adultery, is no bar;—to bar they must shew connivance;—a man may forgive his wife without satisfactory reason if he pleases: but such a man is entitled to his divorce, if his wife commits subsequent adultery.—I see folly here, but no connivance; conduct depends on a man's understanding, and on various circumstances.

*Per Curiam.*—Mr. Baron GARROW.

She curses her paramour, and blesses her husband, to whom she then means to return.—Having found an easy reception before, she expects it again, but soon repents; and the messengers cross between her husband and her paramour.

*Mr. Warren.*

This is inconsistent with her husband's having led her into adultery;—there is nothing on which they can build connivance, but on the facility of forgiveness;—there is no counterplea;—there is nothing which would lead the husband particularly to plead his own conduct.—If they could shew conversation by which she pleaded her having children, and promising better conduct;—he would still be in a situation to demand a divorce on subsequent adultery after condonation.

*Dr. Jenner on the same side.*

It cannot be argued that condonation is a licence to commit adultery; but it will be argued that the facility of the husband in the first instance has led to the wife's second guilt.—I do not know that it is any where exactly laid down, what conduct shall be shewn on the part of the husband, to entitle him to a divorce on a second adultery. Here they had not long been married; there were two children;—the presumption is that they lived on terms of affection;—nothing of connivance or inattention in the first elopement; it is unfortunate that the mother of the wife was the only witness to her conduct.

If there was any evidence of negligent conduct of the husband after condonation, the case would be different.(a) Sanchez, lib. 10. Disput. 5. No. 19,

(a) *Ultimus casus est quando conjux innocens alteri condonat adulterium, et sic reconciliantur. Cum enim divortium sit in favorem innocentis, potest innocens cedere jure suo, delictumque condonare, et sic cessabit jus divortii: hæc autem remissio est duplex quædam expressa, quando scilicet verbis expressis innocens*

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20. (b) What was the conduct of the husband on hearing of the second elopement? He turned pale immediately—then he did not expect it.

The doctrine is, that the husband, having occasioned the adultery of his wife by his own conduct, shall not complain of it: here it must be held that facility of condonation is a bar, as occasioning adultery.

No rule for the condonation of the husband is laid down by law.

*Dr. Swabey in reply.*

His mode of reception after her elopement was an encouragement to adultery, and his excessive fondness and fatuity. *Fatuus est qui meretricem retinet.* The law does not administer justice in such cases. The law books look with great jealousy to condonation. We prove that the husband's conduct constructively produced the adultery.

The Judges Delegate pronounced for the appeal, and reversed the sentence of the Court below.

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conjux adulteram sibi reconciliat condonans delictum, &c. alia autem est remissio tacita, &c. Sanchez, lib. 10. D. 5. 19, 20.

(b) Id tamen observandum est, si reconciliatione factâ conjux ille reconciliatus in adulterium relabatur, posse non obstante priori illâ reconciliatione, de novo eo adulterio illum accusari, et ratione illius celebrari divortium. Sanchez, lib. 10. D. 5. 20.

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ARCHES COURT OF CANTERBURY.

HAWKINS and COLEMAN v. COMPEIGNE.

1818.  
Trinity  
Term.  
June 18.

(An appeal from the Consistory Court of Winchester.)

**T**HIS suit was brought by the chapel-warden of the Chapel of the Holy and Undivided Trinity in Gosport, against David Compeigne, for refusing to pay a church-rate upon two pews, in the chapel of which he was then a part proprietor. The Court below pronounced the rate to be due, and from that sentence an appeal was interposed.

By the general law, there can be no permanent property in pews. Sentence of the Court at Winchester reversed.

The libel pleaded that the Chapel of the Holy and Undivided Trinity of Gosport, within the parish of Alverstoke, was built and consecrated in 1696. That the pews in the chapel are the personal property of various persons residing in the town of Gosport, and in other places—that no inhabitants of Gosport, except such of them as are owners of pews, or some parts thereof, have any pecuniary interest or property in the said chapel—that from

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HAWKINS  
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the foundation of the chapel to the present time the repairs of the said chapel and walls, and of the chapel yard, the providing books and surplices, and all other disbursements for the said chapel, have been uniformly provided for, and paid by, rates made on such inhabitants of Gosport, or persons residing in other places exclusively, as were owners of pews or property in the said chapel in proportion to the value of their said pews and property, a value agreed upon shortly after the building of the chapel. That Charles Hawkins and Thomas Woodward, the churchwardens from Easter 1815 to Easter 1816, of the said chapel, were obliged to lay out considerable sums of money in and about the repairs of the said chapel, and for other things and matters relating to the office of churchwardens of the said chapel. That a vestry was held in the chapel, on Sunday the 7th of January, 1816, in pursuance of notice given in the said chapel on that day, and also on the preceding Sunday, that a vestry would be held in the chapel, on Sunday the 7th of January, for the purpose of making a rate to defray outstanding bills and other necessary disbursements for the chapel, by the majority of persons attending the said vestry. It was resolved that a rate of two shillings in the pound on the owners of pews in the said chapel be made for the purpose of defraying outstanding bills and such other necessary disbursements as may be wanting for the chapel. That a rate according to this resolution of the vestry, was duly made on the proprietors of the pews in the chapel after the rate of two shillings in the

pound, according to the value of such pews which they held, occupied, or enjoyed in the said chapel.

Secondly.—That David Compeigne, at the time of making the rate, was proprietor of two pews within the chapel, one of the value of 18*l.* for which he was rightly and equally assessed in the rate aforesaid, at the sum of 1*l.* 16*s.* ; the other of the value of 20*l.* 10*s.*, for which he was rightly and equally rated and assessed, at the rate aforesaid, at the sum of 2*l.* 1*s.*

*Adams and Burnaby against the rate.*

The suit is to compel the payment of money by legal process. The rate is two shillings in the pound, in relation to the value put upon the pews soon after 1696, when the chapel was built. It is instituted by persons in the character of chapelwardens, against a person called a pew-owner. When payment is demanded, he who demands, and he on whom the demand is made, must stand in the relation in which by law the one is entitled to demand, and the other is bound to pay. What the chapelwardens and pew-owners are, nothing special is shewn ; therefore, the demand must rest on the general law. By the general law the disposal of pews is in the ordinary—the exceptions are where there is a faculty by which the ordinary has already acted, or usage which presumes a faculty, and the authority of the ordinary. Nothing here is pleaded of prescription, nor could there be, for the chapel is too modern ; there is nothing to take it out of the disposal of the ordinary. It is pleaded that the chapel was duly consecrated in 1696 ; that the pews belong to certain persons inhabitants of

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Gosport and elsewhere ; and that the expenses have always been paid by a rate on the pewholders, according to the value of the pews settled soon after the building of the chapel. What is there in this to make any difference as to repairs for all other places of divine worship? The payment by the pewholders must have been voluntary : they do not plead that any person refusing has ever been compelled to pay. This case differs from all cases of legal obligation ; the burthen of repairing places of public worship lies on the parishioners generally—here it is stated not to lie on the parishioners at all, but on the pewholders residing in Gosport, and elsewhere : they may reside any where all over the kingdom. The chapelwardens are not parish officers, who are under the general law to levy rates; no special right is shewn ; it differs from the general law also as to the mode of contribution. A rate is a tax levied by the parishioners themselves in vestry, such the Ecclesiastical Court has jurisdiction to enforce ; this is levied on a person who resides out of the chapelry. There is a difference also from the ordinary practice in the mode of contribution ; a rate is generally on the land and houses in a parish or on a person in respect of his land or taxes—here they plead that the pews are the personal property of the holders.—What species of property can there be by law in a pew? Such a rate could not be enforced by the Ecclesiastical Court, even if the rates were made at a meeting of the pewholders. If the Bishop might order the repairs to be legally done by monition, it could only be binding on persons legally obliged to repair.—The question now is,

whether the Ecclesiastical Court can enforce the payment of money in this form—this we deny.

Perhaps, the more correct way would have been for our party to have appeared under protest in the Court below, but we contend the libel must be rejected.

Swabey and Jenner contra.

The rate is confirmed by the Chancellor—it states the uniform custom from the erection and consecration of the chapel, and the rate was made at a vestry held in the chapel by a majority of those attending ; all that has been contended for is true as to chapels and parochial chapels—but the repairs of chapels are provided for on consecration by contribution, which is good by usage ;—we plead usage here, which, though not authorized by the general law, may be supported by exceptions to the general and usual course—but if the assessment is duly made by the persons assembled who are interested, it is sufficient.—

The expense has uniformly been provided since the building of the chapel, and that will support an assessment on such property.

JUDGMENT.

Sir JOHN NICHOLL.

The party is cited for the subtraction of chapel-rate—a libel has been admitted in the Court below,—and the question is, whether that libel states such a case as would entitle the promoters of the suit to recover—it rests on the general law, for it pleads nothing special. The first article is the material part: and the question is, does this state a case which can be enforced in the Ecclesiastical

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Court, and by the general law? By the general law, repairs are to be done by the landowners of the parish or chapelry.—If special circumstances must be pleaded, there are none here; the nature of the chapel is not stated. It is not ancient; for it was built and consecrated in 1696.—What the endowment was;—on what conditions it was built and consecrated;—who were the trustees;—are not set forth.—The libel rests upon the law,—it pleads that the pews were the personal property of inhabitants of Gosport, and other places; and that no persons, except the proprietors, have a pecuniary interest in the pews.—This is contrary to the general law—there can be no property in pews—they are erected for the use of the parishioners.—The ordinary may grant a pew to a particular person while he resides within the parish;—or there may be a prescription by which a faculty is presumed; but as to personal property in a pew, the law knows of no such thing—they plead usage, but do not allege it to be ancient, or that the pews have been so repaired from time immemorial; for they set forth when the chapel was built—they might state the conditions of the consecration; how, and when the usage was established; otherwise, I must consider it as a voluntary contribution.

While the matter appears quite anomalous, and contrary to the general ecclesiastical law of the country, how far a Court of Law or Equity might support the application if there is any trust, it is not for me to say.—But for an Ecclesiastical Court to support the contribution, it must be shewn to have been legally laid.—I know of no authority

but that of Parliament which can authorize a levy different from that which the general law allows.

How the chapelwardens are constituted, does not appear, or how the vestry is constituted or of whom.—The law knows no vestry, but of the parishioners—here they may be all foreigners. I doubt whether any authority could establish such an institution, except Parliament. If it is to be considered as a mere private agreement, they must go to other authority than this to enforce it.

I think they have not set up a case which this Court can enforce. I shall reverse the sentence of the Court below, and reject the libel.

1818.  
*Trinity*  
*Term.*

HAWKINS  
and  
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COMPEIGNE.

## ANDREWS v. LITTON.

Michaelmas  
Term,  
Nov. 11.

(*An appeal from the Consistory Court of Salisbury.*)

Sentence of  
an inferior  
Court in a  
tithe-cause re-  
versed.

**JUDGMENT.**

Sir JOHN NICHOLL.

This was originally a suit for subtraction of tithes commenced in November 1815.—A libel and schedule were brought in—answers were given to the libel, and a sum paid into Court—three witnesses were examined on the libel;—and, on the 16th of May, 1817, sentence was given;—from that sentence this appeal is interposed.

It certainly has happened here, as it frequently does in appeals from the country courts, that this Court has much to lament the slowness and the irregularity of the proceedings.—Nothing is put in issue but the quantity and the value of the tithes—the sum paid into Court varies a little (the difference is 2*l.* 9*s.* 4*d.*), from the sum decreed, but there has been a long suit and great expense—it has been three years in travelling through the two Courts—it is not necessary to enter into the details

of the delay which has taken place in the Court below. I cannot remedy that—but even here it has not been expedited as much as could be wished.—The process was brought in in January, and we do not proceed to the hearing of this short cause till November.—Something of an explanation is offered that the party had it in contemplation to introduce fresh matter into these proceedings, which does not surprise me.

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~  
ANDREWS  
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The irregularities of the Court below are very striking. This Court unwillingly notices them ;—its object is to extract substantial justice from the proceedings ; but it cannot sanction the neglect of principles essential to the administration of justice :—here the irregularities are greater than ordinarily occur.

The libel and the schedule are in the usual form—the latter consists of only three articles.—Without noticing the want of correct specification, it will be sufficient to consider the substance of the schedule, and of the answers to it.

The first article of the schedule charges the subtraction of the tithe of sainfoin for two years, one crop cut for hay, the other for seed, and states the value to be two pounds, or at least one pound.—The defendant in his answers admits that he had these crops—that the tithe of one was worth four shillings—of the other seven shillings—making together eleven shillings—but he adds that nothing is due, for that he set out the tithe in kind.

The Court properly enough pronounced for the eleven shillings, not considering the setting out of the tithe as legally established ; for when a defend-

1818.  
*Michaelmas*  
*Term.*

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ant has in his answers admitted quantity and value, he must plead and prove setting out, if he means to rely upon it as matter of defence.

The second article charges the agistment of sheep, stating that the defendant had eight acres of land, in which he fed one hundred and eighty sheep, and claiming one pound, or at least ten shillings for the agistment.

It might have been sufficient if the defendant in his answers had admitted the highest sum, but he liberally admits considerably more, and pays more into Court.—The Court pronounced for the sum admitted in the answers, which, though not very formal, is at least substantial justice, and does not require to be disturbed.

The third article is for the tithe of calves, and is of the same character:—the schedule charges less than the answers admit to be due, and the judge pronounced for the amount admitted in the answers;—the same observations apply to it.—But at the end of the sentence another item is added, which was neither pleaded in the libel, nor admitted in the answers, nor proved in the cause.—It is for the agistment tithes of one hundred and eighty sheep in the year 1815, and the sum decreed is 1*l.* 8*s.* 4*d.*—The only trace to be found of this matter, is one of the witnesses mentioning that one hundred and eighty sheep were allowed to eat off some roughage; but this is no part of the tithe sued for, and where this value is ascertained the Court is unable to discover. I am in duty bound to reverse this part of the sentence.

It is a matter of no small difficulty to adjust the

whole case satisfactorily.—The money paid into Court was not in the shape of a formal tender;—nor accompanied with an offer of the costs then incurred.—The plaintiff has been assigned to declare whether he would accept or refuse the tender,—the answers admit more to be due than the money paid into Court; yet the money paid into Court exceeds the amount demanded in the libel: these are strange irregularities.

Upon the whole I shall reverse the sentence;—pronounce 11*l.* 10*s.* 7½*d.* to be due to the vicar for tithes—allow him 10*l.* nomine expensarum, which will I think cover the expenses up to the time when the money was paid into Court.—And as the money so paid in, exceeded the sum demanded, I shall leave each party to pay his own costs from that time.

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1818.  
*Michaelmas*  
*Term.*  
ANDREWS  
v.  
LITTON.

## PREROGATIVE COURT OF CANTERBURY.

1818.  
*Michaelmas*  
*Term.*  
 Nov. 23.

MANSFIELD v. SHAW.

The executor under a former will, has a right to put the executor of a latter will upon solemn proof of that instrument, and to interrogate his witnesses: but if he goes beyond this without being able to prove his case, he becomes liable to costs.

## JUDGMENT.

SIR JOHN NICHOLL.

The evidence leaves no possible doubt as to the case, and the question is narrowed to the consideration of costs,—and on this point I have no doubt from the conduct of the party, and the complexion of the cause.

Immediately on the death of the deceased the adverse party, though he knew of the existence and validity of the latter will—obtains probate of the former will—takes the executor's oath—gets possession of the house and property, and has continued in it ever since.—The probate was very soon called in;—if he had made candid enquiries, and candidly considered, he could have entertained no doubt.

The law gave him the right to call upon the executor to propound his will “in solemn form of law,” and to interrogate the witnesses:—but he

went further, and pleaded what he must have known he could not prove.

There was no "just cause of litigation" to go to the extent he has gone. I think I must in justice give those costs against him, which have arisen from the admission of his allegation.

1818.  
*Michaelmas*  
*Term.*  
  
MANBYFIELD  
v.  
SHAW.

THOMAS v. WALL and Others.

*Michaelmas*  
*Term.*  
Nov. 23.

ISAAC PADMAN died on the 30th of August, 1818, leaving a formal will, dated 29th July, 1816, and a testamentary paper signed, and having an attestation clause to which there were no witnesses. The will was not disputed—the testamentary paper was propounded as a codicil under the circumstances set forth in the following judgment.

JUDGMENT.

SIR JOHN NICHOLL.

The will is in the handwriting of the deceased—it is dated, executed, and attested, by three witnesses—the codicil is also in his handwriting, but it is not signed, nor attested, it is propounded by Mr. Thomas, and opposed by the executors. The allegation states, "That after the deceased had executed his will, the Rev. Thomas Hampaye, one of the persons he had named executor, told him that

A codicil unsigned, and having an attestation clause unattested by witnesses, admitted to probate.



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*Michaelmas*  
*Term.*

THOMAS  
v.  
WALL.

he wished to decline acting, and that the deceased in consequence was desirous of annulling his appointment as executor of his will, and substituting another in his stead; and also wishing to make other alterations in his will; sometime in the year 1817, the time more particularly the party propounded cannot set forth, did draw and write the codicil exhibited in this cause, and placed the same, together with his will; in the envelope, in which he had before placed the will alone, and altered the endorsement by crossing with his own hand the names and words 'Rev. Mr. Hampaye,' and 'November,' and inserting over the same the names and words on 'the Rev. Mr. Thomas,' and 'July;' and then deposited the codicil enclosed in the envelope in an escrutoire in his bedroom."

The codicil is fairly written,—it is all in the deceased's handwriting;—strong reasons are given for the change of the executor—it was deposited with his will, and endorsed;—there is no doubt, I think, but that the deceased intended it should operate; certainly on the face of it, it is an imperfect paper, but the presumption against it is slight; therefore, slight circumstances will remove it.

The second article pleads, that on the 24th of August last, being six days before his death, Mr. John Davis, one of the executors named in the will, called on the deceased, and was introduced into his bedchamber; that the deceased was then lying on his bed, in a very weak and enervated state; that he requested his wife who was then in the room to take out his will from the cabinet in the said room,

who then immediately produced to Mr. Davis from such cabinet the packet containing the will and codicil; and Mr. Davis, at the request of the deceased, then read the said will and codicil all over to him audibly and distinctly in the presence of his wife, and then asked him, "if he thought there could be any cavil;" who replied, he thought not if the codicil were signed, whereupon the deceased who was then very ill, and could not sit up without pain and difficulty, his disorder being an enlargement of the kidneys, said if he got better he would write it all over again; on which Mr. Davis advised him to do nothing with his will in his then state, he being then, as he had been and continued to be, in the most acute pain from his disease; and that the deceased's wife then at his request replaced the papers in the cabinet, and the deceased soon after such conversation fell into a doze. The third article pleads that from this time the deceased grew gradually worse till his death, and was continually when awake in the most excruciating pain, and incapable of conversing for a few minutes, without experiencing the utmost bodily suffering; and in consequence of pain, and the effects of opium, his mental energy was destroyed, and in this state he continued till his death.

If these facts should be proved, the presumption of law will be completely repelled.—There is an anxiety in the deceased that the codicil should operate, but he was in too much pain to attempt to sign it;—he attempts to write it over again; these are strong marks of his adherence to it.

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Michaelmas  
Term.  
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v.  
WALL.

1818.  
*Michaelmas*  
*Term.*

If these circumstances are fully proved, there can be no doubt.

THOMAS  
v.  
WALL.

The allegation was admitted (a).

1819.  
*Hilary*  
*Term.*  
Jan. 23.

*HOOTON and DICKENS v. HEAD.*

A former will  
not revived  
by the cancel-  
lation of a will  
of a subse-  
quent date.

## JUDGMENT.

SIR JOHN NICHOLL.

On the facts of the case there is no contrariety of evidence;—the deceased died a bachelor;—he had made several wills, and it was his habit when he made a new will to cancel the former one.—On the eighteenth of November, 1816, he called at the house of Mr. Day, his solicitor, who was not at home; but Mr. Moore, the confidential clerk attended upon him, and undertook his business under circumstances which he states in the following manner: “Mr. Day being in London, the testator communicated to the deponent his wishes and intentions respecting some alterations he proposed to make in his will; the deponent thereupon (having access to all the said Mr. Day’s papers) produced the deceased’s then existing will to him, which, to the best of his recollection and belief, bore date

(a) The facts stated in the allegation being known to be correct, no further opposition was made by the executor; and the codicil was admitted to probate on the 9th of December, 1818.

some time in the year 1815, and which had been formed by the said Mr. Day of the three first sheets of a former will, executed by the said John Head the testator, sometime in the year 1809, and of the three sheets in his the said Mr. Day's own hand-writing in continuation; the deponent then read the said will all over to the said testator; and as the said John Head, the testator, explained to the deponent as he read the same, the alterations he was desirous of making in his said will, (one of which he well remembers was to alter the bequest of one moiety of the clear residue of his the testator's personal estate, which by his then existing will he had given his sister Ann Hooton, wife of the said Daniel Hooton, a life interest in only, and the principal immediately after her decease, equally between all the children of his said sister Ann Hooton, except her sons John Head Hooton and William Hooton, so as to give the said moiety, or said clear residue of the testator's said personal estate, to his sister Ann Hooton, and her husband Daniel Hooton, absolutely) he made such alterations with a pencil in two of the latter sheets of the then existing will, as he read the same to the testator, and received instructions from him for that purpose so as to make the same agree with the wishes and intentions of the testator; for the aforesaid three first sheets of the then existing will, not requiring any alterations to be made therein, as the testator was not desirous of making any alteration in the devises to which the same related, he the deponent took the three first sheets of the

1819.

*Hillary**Term.*

Hooton

and

Dickens.

o.

HEAD.

1819.  
*Hilary*  
*Term.*

HOOTON  
and  
DICKENS  
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HEAD.

then existing will, as a part of the will which he then formed for the testator, agreeably to his wishes and directions; and then having made the several alterations in ink which he had previously made only with a pencil in the two sheets of the then existing will, agreeably to the testator's intentions, and having caused the sixth or concluding sheet of the will, which he was then forming in manner aforesaid, to be written by James Day (another clerk in the office) whilst he was engaged in writing the aforesaid alterations in ink, in the two sheets of the former will, he the deponent then, in the presence of the testator, cut off the names of the subscribing witnesses appearing, as well in the margin of the three first sheets of the former will, as also in the margin of the two latter sheets thereof, which were as aforesaid in Mr. William Day's own handwriting, but did not cut off the testator's name from the three first sheets as the same now appear cut off from the same, and as is pleaded in the said first article of the said allegation; for the testator's name had already been cut off therefrom, at the time when Mr. William Day had, as is predeposed, taken the three first sheets from a former will executed in 1809, to make the same serve as a part of the will, which the deponent altered in manner hereinbefore set forth, on the 18th Nov. 1816; and which the said testator had executed in the year 1815, as he the deponent also believes; and the deponent further saith, that having in manner hereinbefore mentioned formed a temporary

will for John Head the testator; for it had been settled and agreed upon between the testator and the deponent that a fair copy was to be made thereof by the following Wednesday, being the 20th day of the said month of November, and that the deponent was to attend him the testator therewith, on that day to see him execute the same. He the deponent then read the said paper writings to the testator, who perfectly well knew and understood the same, and approved thereof; and in order that he might not be without a will during the time required to get the same engrossed as aforesaid fair for execution (*viz.* till the Wednesday following) he expressed a desire to execute the same; and the deponent having thereupon called in his fellow subscribed witnesses to the said will, Mr. James Day and Mr. George Palmer Edis, who were then also clerks in the said Mr. William Day's office, to attend and see the testator execute the said intended temporary will; and they having accordingly come for that purpose into that office, where the testator and the deponent then were, he John Head the testator, then in the presence of them the said James Day, George Palmer Edis, and the deponent, traced over his name with a dry pen, which had been set and subscribed at the foot or the bottom of each of the said five first sheets, now forming a part of the will propounded in this cause, previously to the same being applied to such use, (for the same had been so subscribed by the testator, at the time they were made a part of his former will in the year 1815, as the deponent verily believes, and hath not the

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*Hilary*  
*Term.*

HOOTON  
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HEAD.*

east doubt) and he then, that is to say, on the 18th Nov. 1816, also set and subscribed his name 'John Head' at the conclusion of the clause written on the back of the fourth sheet of the will; and also at the conclusion of the last sheet of the said will, in manner and form as now appears therein, and when he had so done, he sealed, published, and declared the paper writings contained in the said six sheets of paper, as and for his last will and testament; and requested them the said Mr. James Day, Mr. Edis, and the deponent, who were present during the transaction, to be witnesses to the execution thereof in the usual manner and form, for which purpose the deponent made use of or dictated the words commonly used on such occasions, and the testator either repeated or adopted the same; and then the said Mr. James Day, Mr. Edis, and he this deponent respectively set and subscribed their names to each sheet of the said will, and also on the back of the fourth sheet thereof, where there was a clause subscribed by the said testator as aforesaid, as witnesses to the execution of the said will, soon after which being done, the testator went away, leaving the will with the deponent, for him to get a fair copy thereof made for him to execute on the Wednesday then next following, when the deponent was to have attended him therewith for that purpose."

Thus Moore states a temporary will was formed in order that the deceased might not be without a will, till a more formal will was executed;—it was rather an executed draft from which a will was to be prepared, than a will.—On the 22nd of Novem-

ber, he met Mr. Day at Kimbokon Market, who appointed him to come to him on the next day. On the 28rd he made a will including the usual revocatory clause;—there were some slight alterations, but generally the bulk of the will was the same.

Mr. Day is not certain that he carried the will of the 18th with him, but he does not venture to state that he called it to the mind of the deceased as an existing will.—A month afterwards the deceased sends for Day, and executes a codicil by which he revoked a legacy of 200*l.*, and his furniture to Mrs. Potter his housekeeper who had offended him, and left her only 100*l.* The deceased twice sent for his will, which Day had taken away with him, but did not obtain it;—he then got a Mr. Harrison to write a paper revoking the 100*l.* legacy to Mrs. Potter;—he being jealous of Day for not having pursued his direction respecting Mrs. Potter.—The deceased agreed to send for the doctor; he executed two codicils which he sealed up; and being anxious to prevent Day from carrying them away with him, he locked them up in an iron chest. The deceased felt dissatisfaction at the disposition of his property, and on the 29th of December, 1817; he put his will and the codicils into the fire intentionally and deliberately. The will of the 18th of November remained in possession of Mr. Day.

The question for the Court is, whether, upon the destruction of this second will, the first was revived or revoked;—this description of question has frequently arisen, and been repeatedly agitated.—In some cases it has been contended that the former

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Head.

will is so far revoked, as to require some act of revival ; in others that the mere preservation is sufficient to revive it.—In *Glazier v. Glazier*, (a) both instruments were in possession of the deceased ;—though the *dicta* thrown out are adverse to the necessity of an act of revival.

The clear result of all the cases, the common sense of them, is that it must be ascertained whether it was or was not the intention of the deceased, that the will should stand ; and in a late case, (b) *Moore v. De La Torre*, the delegates seem to have come to the conclusion that it was to be considered as a question of intention.

In the present case it is unnecessary to decide in the absence of circumstances on which side the presumption lies ;—it is unnecessary to consider the balance of presumption which might turn the scale, because there is no doubt from the circumstances.

This was not considered as a formal will, but as a draft ; and as such would be done away when the will made from it was executed. When he destroyed the latter will, it is not probable that he meant to revive the other, any more than that it is probable that a person by destroying a will means to revive the draft.—To suppose that he meant to revive the legacy to Mrs. Potter would be to go in the teeth of all the evidence. Assuming it to be a formal regular will, yet it being the practice of the office to cancel wills when a later one was made, the deceased naturally would suppose it cancelled ; it seems never to have been in his contemplation since he executed

(a) *Barrows*, p. 2512.

(b) *Vol. I. p. 375.*

it;—it was never brought to his notice;—if the evidence of it is correct, he said he had no other will;—when he destroys his will there is no declaration that he had a formal will;—all his declarations at the last were that if he did not make a new will, he would have none. His declarations also were, that his property would go away amongst all his relations;—unless we are to discredit two witnesses, he repeatedly declared that his mind was easy, that now he had no will.—He could, therefore, have had no intention whatever, when he destroyed one, of reviving the other; and I think I am bound to pronounce against the will, and for an intestacy.

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*Hilary  
Term.*

HOOTON  
and  
DICKENS  
v.  
HEAD.

The costs of both sides were directed to be paid out of the estate.

*In the goods of JENKINS deceased.*

*Hilary  
Term,  
Feb. 1.*

### **PER CURIAM.**

A creditor having obtained an administration, and completely settled his own debt, goes away;—he does not fall within the late act;—and I see no other remedy than that the administration should be revoked, and the executor should retract his renunciation, and be allowed to take probate of the will; otherwise great loss might accrue, and injustice might be done. The Court has greater authority over an administration with the will annexed, granted to a creditor, than over an administration under the statute.

Administra-  
tion granted  
to a creditor  
revoked he  
having settled  
his own debt  
and gone  
away.

## CONSISTORY COURT OF LONDON.

1819.  
Hilary  
Term,  
February 3.

## LADY HERBERT v. LORD HERBERT.

Depositions  
taken under  
a requisition  
in a foreign  
country ob-  
jected to be-  
cause they  
had not been se-  
cretly taken.  
Objection  
overruled.

ON the 5th of December, 1817, a requisition issued from the Consistory Court of London, addressed to His Britannic Majesty's Consul General in Sicily, and to the judges and magistrates, civil and ecclesiastical, in the city of Palermo, or in any other place or town in Sicily, requesting them jointly or severally to take the depositions of the witnesses, produced on a libel given in by Lady Herbert, in a suit brought by her against her husband, for the restitution of conjugal rights. The examination having been completed, the requisition was returned: but an objection was now taken to that return; because, as it was alleged, the depositions of the witnesses had not been taken *secretly*, but in the presence of Don Camillo Gallo, acting as the substitute for Lady's Herbert's proctor.

*Arnold and Swabey for Lord Herbert*

Contended that all the proceedings had under the commission were invalid, and that the depositions must be quashed.

*Phillimore and Lushington contra.*

JUDGMENT.

Sir WILLIAM SCOTT.

The present question arises upon an objection made to the return of a commission to examine witnesses in Sicily touching the marriage of Lord Herbert with the Princess of Butera. The commission issued from this Court; and was directed to the English Consul in Sicily, and to the civil and ecclesiastical judges in that country: it was accepted by one of the judges at Palermo, and his Britannic Majesty's Consul General.

It is objected that many irregularities took place, which are not pressed upon the consideration of the Court. One however is, *viz.* that the commission was not executed according to its own proper form and directions, and that it is clear that it ought to have been executed according to its own form as delegated, and not according to considerations arising out of the law of the country in which it was executed;—the evidence was to be secretly taken;—but that it was not so;—for the substituted agent of the Princess of Butera was present, which was a violation of the secrecy enjoined. On this ground the commission is said to be vitiated, and it is prayed that the return should be quashed.—Undoubtedly, if the Court had reason to believe that this error had led to important consequences in polluting the evidence, it would however unwillingly after the length of time this cause has lasted, and the several obstructions that have been given to it, resort to the measure of sending out a new commission:—but if there should be reason to believe that the irregularities arose from mistake, and from the misapprehension of a word which might easily be mistaken, and that the judges had in all other respects acted duly I think

1819.  
*Hilary*  
*Term.*  
HERBERT  
*v.*  
HERBERT.

819.  
Hilary  
Term.

HERBERT  
v.  
HERBERT.

I should depart from my duty if I did not allow the evidence to be inspected before I pronounced against it.

The commission went out with an order that the witnesses should be examined secretly, such is the form and rule of the canon law, by the judge in the presence of a notary public.—Our own municipal law holds a different practice ;—it is to be observed, however, that the secrecy enjoined by the civil and canon laws is varied by the local regulations of different countries: it is not interpreted exactly the same in any one country as in another.—In this country it is not the practice for the judge in person to take the examination of witnesses ;—but it is confided to an examiner who examines secretly.—In the present case the office of examiner has been performed in a more dignified manner by one of the chief magistrates of the country, and one of the representative functionaries of the English government: there is therefore some security here that all has been rightly done.—I must admit that, supposing the word *secretly* to have been rightly understood, the witnesses ought to have been examined according to the authority given by those who delegated it ;—but I accede to the observation that *secret* is an ambiguous word, and I do not wonder that it led to a mistake which it may be proper to guard against in other requisitions sent out to foreign countries. There are different degrees of secrecy :—a tribunal is secret where it is held *januis clausis* ;—another species of secrecy is where none but the judges and parties only are present ;—another where the judges only are present.—I do not wonder when

this commission came into a country where they are used to examine witnesses *januis clausis*, where they exclude a public and general auditory, taking the evidence with the judge, notary and representative of the parties only present, that they might easily think they had done right in taking the depositions as they have done ;—it is natural they should so explain the word secret ;—there is no reason to consider it as an intentional perversion.—In these commissions, which go to foreign countries, I think it may be hereafter necessary and proper to throw in some words which may prevent such a misconception as naturally seems to arise from our own practice. Arising, as it does in this instance from natural misapprehension, it does not impress this Court with any suspicion: it is clearly an impression existing on the minds of all parties.—Don Martini, the substitute for Lord Herbert, complains that he alone was not admitted: the notion is merely taken up by counsel here, that he objected on any other ground. Where all parties act under this natural mistake, it is not necessary that I should consider the evidence as unduly taken and vitiated, before we examine that evidence.

I think I have great securities in the character of the persons who presided at these examinations; and from the nature of the suit which goes rather to the adjudication of a point of law, than of a question of fact.

Looking to all these considerations, I cannot say that the depositions must be quashed as unfairly taken: I think this evidence may serve as the basis of a sound judgment.

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1819.  
Hilary  
Term.

HERBERT  
v.  
HERBERT.

## ARCHES COURT OF CANTERBURY.

1819.  
Hilary  
Term,  
February 4.

BRISCO v. BRISCO.

*An Appeal from the Consistory Court of London.*

Court of Ap-  
peal on an ap-  
peal from a  
grievance,  
cannot enforce  
the payment  
of costs incur-  
red in the  
inferior court.

**UPON** an appeal from the rejection of several articles in an excepted allegation.—Application was made to the Court to enforce the payment of the costs which had been incurred in the Court below.

*Per Curiam.*

Is there any instance of this? This is only an appeal from a grievance. I doubt whether the Court can take any such step;—it is the fault of the party in allowing the exceptive allegation to be given in before the expenses were paid. The case may stand over for precedents: but, as it now strikes me, the Court would not be warranted in acceding to this application, particularly before the process has been brought into this Court.

CONSISTORY COURT OF LONDON.

1819.  
*Hilary*  
*Term,*  
*February 4.*

JOHNSTON v. PARKER, *falsely called* JOHNSTON.

**THIS** suit was instituted by Henry Erskine Johnston, to obtain a sentence declaratory of the nullity of a marriage solemnized between him and Nanette Parker by licence on the 19th of June, 1796.

A marriage solemnized by licence in 1796 declared null and void.

Nanette Parker was not sixteen years of age: but her father was present at the marriage, and consenting to it. Henry Erskine Johnston obtained the licence, on making oath that he was of the age of 21 years and upwards. He now however adduced evidence that he was at that time a minor, and that his father did not consent to the marriage. The exhibit originally annexed to the libel stated his birth to have taken place at Edinburgh, on the 5th of August, 1774;—this exhibit however was withdrawn upon application to the Court on account of a clerical error; and in the place of it another substituted, which placed his birth on the 5th of August, 1775. The disannexed exhibit had been ordered by the judge to remain in the registry till the final hearing of the cause.



1819.  
*Hilary  
 Term.*  
 ~~~~~  
 JOHNSTON
 v.
 PARKER.

The father of Henry Erskine Johnston was examined; and deposed to his son's birth in accordance with the last exhibit, and fortified his recollection by a reference to an entry in a family Bible.

Jenner in support of the marriage.

The marriage in this case has subsisted for 22 years; there have been issue of it seven children, three of whom are now living. These children may have contracted marriages with other persons with their father's consent, all which marriages would now be null and void. The licence was obtained by the parties now suing for the nullity. The want of the father's consent must be admitted to be proved: but there is no sufficient evidence of the minority of the husband at the time of marriage; it would not be assisted by the entry in the family Bible, as the father had ten children, and the entry was not made at the time of the birth of this child. In *Sayer v. Davies*, such evidence was held insufficient.

Swabey and Lushington in support of the nullity.

It is the duty of the court to carry into effect the provisions of the statute; and it is essential to the public to know the relative situation of the parties: length of cohabitation therefore, and the birth of children, afford no bar to the sentence of the Court. —The Court has frequently pronounced a sentence of nullity on less evidence than is adduced in this case.

JUDGMENT.

Sir WILLIAM SCOTT.

This is a proceeding to dissolve a marriage which

took place between Henry Erskine Johnston and Nannette Parker in June, 1796. There have been several children; three of whom are now living. These circumstances however would not prevent the Court from dissolving this marriage, though the consequence may operate with great severity on the issue. The words of the Act of Parliament are positive and peremptory, and the Court is under the necessity of enforcing it ;—it is better at any time to stop as soon as possible, lest the continuance should involve the interest of a greater number of persons, for there is no time in which it will not affect the interests of parties: the length of cohabitation however forms a strong call on the circumspection of the Court to see that the evidence is complete. The reason why it has not been attempted to invalidate this marriage before does not appear; there may have been a cohabitation up to the date of this suit. Of the history of the parties I know nothing—possibly there may be reasons to induce a desire of setting aside this marriage: but they ought to be strong ones.

The evidence should be full and conclusive. The want of consent is admitted to be fully proved; the marriage is also fully proved to have taken place at the time stated, *viz.* June 19, 1796: the only question is, whether the party at that time was of sufficient age? The invalidity must arise from being under the age of twenty-one;—there is evidence which I should think sufficient in an ordinary case. The father, mother, and aunt, depose to the birth of the child; persons pretty far advanced in life: and though the memory of persons at that time of

1819.
*Hilary
Term.*

JOHNSTON:
v.
PARKER.

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Hilary
Term.
JOHNSTON.
vs.
PARKER.

life is subject to infirmity, and they have ten children, the history they give is distinct. The husband himself, when he obtained his licence, deposed that he was twenty-one years of age and upwards. I observe him spoken of by his father as a youth of honourable disposition ; and I am willing to suppose that he took this oath under the idea that he was of the age he describes himself to be. There is likewise annexed to the libel a certificate signed by the father : this was associated to the libel for a great length of time, not contradicted till the May following, and then begged to be withdrawn, on account of a mistake. This application was not allowed, and to this moment no explanation has been given why 1774 was substituted for 1775. A family Bible has been referred to. I will not say in all cases that such a Bible should be produced, when I see the mistakes, the extreme mistakes, in the other instrument.

I shall not immediately proceed to sentence in this case : but shall expect the Bible to be produced, properly verified ; and the mistake of the dates to be fully explained.

The Court rescinded the conclusion of the cause to admit the production of the family Bible.

The Court pronounced for the nullity.

ARCHES COURT OF CANTERBURY.

HAYES, falsely called WATTS, v. WATTS.

1819.
Easter
Term,
May 20.

*By letters of request from the Commissary Court
at Winchester.*

JUDGMENT.

Sir JOHN NICHOLL.

This is a suit of nullity of marriage, brought by Mary Hayes against John Watts. The circumstances are peculiar; the marriage was not clandestinely had: but it is admitted that the woman was a minor, and married with the consent of her mother, who was supposed at the time to be a widow. But the father in fact was then living, and is still living; and he only could legally give consent, without which the marriage is null and void.

A marriage pronounced null after a cohabitation of eighteen years.

Eighteen years after the solemnization of the marriage, without any alleged impropriety, it is sought to be set aside, not at the suit of the husband, as more frequently happens, but at the suit of the wife. It does not appear whether there is any issue.

1819.
*Easter
Term.*

HAYES
v.

WATTS.

Eight witnesses have been examined on the libel, and they leave no doubt. The father has been examined, and the sister of the wife. The entry of the baptism was in 1780 ; the father was then a shipwright at Deptford, and the daughter was baptized there ;—in 1781, the father went to America, leaving his wife and child here ; he returned to England in 1795, and soon afterwards again went back to America. During his first absence, he was supposed to be dead, and his wife married again. It is clearly proved that the father never heard of his daughter's marriage.

The marriage took place May 29, 1820, the woman being rather under twenty. The mother gave her consent—no false suggestions or fraud are set up :—but the want of the consent of the father is proved ; and, though the parties did intend to contract a valid marriage, yet either of them has a right to the benefit of a declaratory sentence.—No such sentence is necessary : but it is a matter of convenience to the parties, that it should be given ; and it is a duty this Court owes to the public to declare the situation of the parties.

SULLIVAN v, OLDACRE, falsely called SULLIVAN.

1819.
Trinity
Term,
June 16.

An appeal from the Consistory Court of London.

THIS suit was instituted by the Right Honourable John Sullivan, for the purpose of annulling a marriage which had been solemnized between his son John Augustus Sullivan, a minor, and Maria, daughter of Thomas Oldacre, the huntsman of the Berkley hounds. The judge of the Consistory Court pronounced for the validity of the marriage; and the cause was now brought on in the Court of Arches, on the same evidence with which it had been instructed in the Court below.

Publication
of the banns
of an illegiti-
mate child,
by the sur-
name of the
mother as
well as by
that of the
father, held to
be valid.

It appeared that John Augustus Sullivan had been left by his father at his seat called Riching's Lodge, in Buckinghamshire, to pass the period which was to elapse between his quitting Eton school, and his admission to the University of Oxford, under the care and superintendence of a private tutor. —During this interval, the young man, without the knowledge of his parents, but with the privity to a certain extent at least of his private tutor, cultivated an acquaintance which had commenced in the preceding hunting season with Maria Oldacre,

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Trinity
Term.

 SULLIVAN
v.
 SULLIVAN.

who resided with her father at Gerrard's Cross, which in the course of a few months led to the marriage in question. The marriage took place in St. Olave's church, in the Borough of Southwark, on the 15th of July, 1816; the husband being then rather more than three months under the age of eighteen, the wife being within three months of twenty-one years of age.—None of the relations or friends of the husband were present at, or apprized of the marriage;—at the time of the solemnization the officiating minister questioned the parties as to the correctness of the proceeding; and in the course of the ceremony he stopped to interrogate them whether they were both of age, and resident within St. Olave's parish, on which a reply was instantly given by the mother of Maria Oldacre, who said, "Every thing is right; she is my daughter, and we live in the parish in Tooley-street."—It appeared also in evidence that an attempt had been made to get the banns published in St. Andrew's, Holborn, which did not succeed.

The grounds on which the validity of the marriage was impeached were set forth in the following manner in the eighth article of the libel:—"That the said Thomas Oldacre, and Amelia his wife, used various means to effect a marriage, without the knowledge of the party proponent, between the said John Augustus Sullivan, and their said daughter. That the said John Augustus Sullivan being prevailed upon by the artifices and misrepresentations of the said Thomas Oldacre, otherwise Oldaker, and Amelia his wife, to consent to such marriage; banns of marriage were published in

the parish church of Saint Olave, Southwark, in the county of Surrey, for three Sundays, to wit, Sunday the thirtieth day of June, and Sunday the seventh; and Sunday the fourteenth days of July, in the present year, 1816, between him, the said John Augustus Sullivan, and the aforesaid Maria Oldacre, otherwise Oldaker, describing them respectively, as John Augustus Sullivan, a bachelor, and Maria Holmes Oldaker, spinster, both of the said parish of Saint Olave, Southwark. And the party proponent doth allege and propound that Maria Oldacre, otherwise Oldaker, the party cited in this cause, was falsely described in the said banns of marriage by the name of Maria Holmes Oldacre aforesaid. That the said name of Holmes was not her baptismal name, nor her name of repute, for that she was not baptized by such name of Holmes, nor was she at any time called or known by such name, nor did she ever use the name of Holmes in any way whatever: but, at all times prior to her pretended marriage with the said John Augustus Sullivan, was known and called by the names of Mary or Maria Oldacre, otherwise Oldaker only, and by no other name or names; and the said name of Holmes was unduly used in the publication of the said banns of marriage for the purpose of fraud, deception, and concealment, and to prevent the real names and condition, and situation of the parties respectively, coming to the knowledge of those who heard the banns published, and of the said Right Honourable John Sullivan, and others interested therein, and likewise to conceal the same from the priest or

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SULLIVAN
v.
SULLIVAN.

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SULLIVAN.

minister by whom the marriage should be afterwards solemnized."

To this it was replied that the name of Holmes was not used for the purposes of fraud, but from caution, and the desire of having the banns correctly published; for that being born before the marriage of her parents, (which she was proved to have been,) and, consequently, illegitimate, she had taken the surname of her mother, as well as that of her father, to prevent the possibility of mistake as to her real name. The charges of artifice and misrepresentation were denied;—and letters were produced from John Augustus Sullivan, written to his wife subsequent to the marriage, couched in the language of ardent affection and attachment.

Stoddart, Jenner and Dodson, in support of the marriage.

The argument must be reduced to a dry legal question of due or undue publication of banns, and this is confined solely to the name of the woman;—if concealment had been intended, and from the family of the man, the probability is, that the alteration would have been in the name of the man.

The act requires the publication to be as it has been held in the true names: here there was a publication, and by the true names. The objection is, that another was added.—The decided cases on this subject divide themselves into three classes, viz.

1. Where the name is totally different.
2. Where part of a name is omitted.
3. Where part of a name is inserted.

Of the first class are *Early v. Stevens*, in 1785;

Copps v. Follon, Longley v. Gordon, Frankland v. Nicholson, Mather v. Ney, Wakefield v. Mackay, Wilson v. Brockley, Mayhew v. Mayhew, The King v. The Inhabitants of Billingham; in all these there was a total difference of the name, and they cannot be made to apply. In the second class is the case of Ponget v. Tomkins, where the omission had the effect of a total alteration, and where there were strong circumstances of fraud, on which the case was determined.

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In the third class many cases have been argued on the admission of the plea, though they have not gone to proof, Heffer v. Heffer, Tree v. Quin, Dobbin v. Corneck. The libels were admitted: but the Court reserved its determination till it should see what of fraud was proved. In Fellowes v. Stewart the marriage was annulled expressly on the ground of fraud.—There must be either a total destruction of notoriety, so that persons knowing the party would not recognize her at all, or a fraudulent alteration of the name.—Here Maria Holmes Oldacre is used for Maria Oldacre: this is not an addition which would conceal the party;—there was no fraud in the use of it, and a reasonable explanation is given.—We contend that the publication was good, that the true name was used, and that the addition of that of Holmes is sufficiently accounted for.

Swabey and Phillimore, contra.

The intent of publication is notoriety.—Here there is concealment, which under the circumstances of the case is fraud: they resorted first to St. Andrew's, Holborn, and then to St. Olave's,

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Southwark, in neither of which parishes they resided, or were known;—this resort to different parishes has been held in various cases an ingredient of fraud, as in *Mendocroft v. Gregory*, and *Ponget v. Tomkins*. Add to this, the false answers of the mother at the time of the marriage, and her positive assurance to the officiating minister that the parties were both of age, and resided within his parish; then the disparity of age and condition lead to the same conclusion. The case of *Fellowes v. Stewart* applies closely.

In *Ponget v. Tomkins* the Court held the attempt to procure a publication of banns which failed, to be the strongest evidence of a fraudulent publication. (a) We contend that the publication was not in the true name; that fraudulent circumstances have been proved; and that this is precisely the description of marriage which it was the object of the act to prevent.

Stoddart and Jenner in reply.

The marriage act has rendered banns necessary which were part of the regular ceremony. To invalidate them it must be shewn that there was no publication, such as would have been irregular before. In *Fellowes v. Stewart* there was fraud in the very assertion of the names: by that the man endeavoured to impose upon the other party, and to obtain an advantage to himself. Where there is a total variation of the name, it is not necessary to consider fraud; for there is then no publication of banns: it is only where a name is inserted or omitted that fraud can be examined into. In *Ponget*

v. Tomkins there was an omission, and fraud applying to it: the name of Holmes was not used most conspicuously. The evidence of residence in another parish is not to be received. As to the objection that this is such a marriage as the act was intended to prevent, it is not so. The act was against clandestine marriages; no marriage can be considered as clandestine where there is a publication of banns. It must be shewn that this is not a publication before the question can be so argued; nor can the conduct of the mother at the marriage affect the validity of the publication of the banns.

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JUDGMENT.

SIR JOHN NICHOLL.

This case comes in the form of an appeal from the Consistory Court of London, where it was a suit of nullity of marriage. Both parties are minors;—the suit is brought by the father of the young man as his guardian. The woman at first appeared by her father acting as her guardian: but she has in the course of the proceedings become a major, and acts for herself. The usual proceedings were had in the Court below. A libel was given in, and twenty witnesses were examined on it; this was answered by an allegation on which seven witnesses were examined. The judge pronounced that the father had failed in the proof of his libel, and dismissed the suit, thereby pronouncing the marriage valid. I am to decide the case on the same facts which were brought to the view of the Court below.

The decision of every Court of competent jurisdiction carries with it a presumption in its favour;

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and it is hardly necessary to add that the personal character of the judge who decided this, as far as it can weigh, gives peculiar weight to the decision. But it is the duty of every Court to form its own judgment with as little prepossession as possible; if I see reason to differ, it is my duty to reverse the sentence:—and, in that case, it would be necessary to enter fully into the circumstances of fact and law, in order that the reasons of the difference might be clearly understood. If, on the other hand, on mature and deliberate consideration of the arguments, I see no reason to differ; then it is not only unnecessary, but there are peculiar reasons of delicacy, why I should not enter into the less material circumstances, but should confine my observations to the real point.

On the facts of the case there is no conflicting evidence. The true question is whether the banns were unduly published: that is the only point of nullity arising out of the proofs.

The citation is somewhat complex:—*it is to answer in a cause of nullity by reason of minority and undue publication of banns.* In a marriage by banns, minority has nothing to do in the citation, as a primary and direct cause of nullity. It might properly enough have found its place in the libel, as a collateral circumstance: but undue publication of banns is the real essence of the suit.

Again, it is pleaded that Oldacre and his wife used arts to induce the marriage: if this be true, it is no cause of nullity, though it may throw light on the publication of banns. Concealment of the marriage by the parents of one of the parties from the parents

of the other is not fraud. The law lays no obligation on the party to discover it; it may be unseemly and dishonourable;—it may give a character to the publication, if it be doubtful whether it be a due or undue publication: but it goes no further;—averments of artifices and misrepresentations are no ground of nullity, if the banns are duly published. This Court does not lay it down that, under no circumstances, there can be fraudulent artifice which may make a marriage void: but it must be such as to take away consent, so that the party contracting did not understand the contract. If he did contract, and is capable of consent, as a minor of eighteen is, the marriage is valid; though there may be some contrivance as to the circumstances;—consent is of the essence of marriage, “*consensus non concubitus facit matrimonium.*” In the libel it is stated that he was prevailed upon to consent;—the evidence gives no countenance to the allegation of artifice being used against him. The courtship was carried on in the presence of his tutor: the young man was active himself in the transaction, and ardent in his addresses.

The real merits of the question lie then in what is stated in the latter part of this article of the libel.

It is pleaded that the woman’s name was Maria Oldacre, and that she is falsely described in the banns as Maria Holmes Oldacre, which was not her name by baptism, use, or otherwise; but was unduly used for the purpose of fraud and to conceal her real name from the persons who heard them, the father of the minor, and others.—If such was the *purpose* and *effect*, the publication was undue,

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and the marriage is void:—but if the name of Holmes was used not for the purpose nor with the effect stated, then the marriage is valid. I agree in the point of law laid down, that fraud must be in the use of the name: other circumstances may bear collaterally, but not directly, upon this. I take this to be the result of all the cases. Those cases were fully discussed in argument, and I shall not travel through them. I shall only advert to that of *Fellowes v. Stewart*, which I perfectly remember was decided on the ground that the names were introduced for the purpose of deceiving the woman and her friends, and that it was calculated to effect that purpose.—It is proper, therefore, to enquire whether the name was introduced here for that purpose, and whether it produced that effect;—if fraudulent concealment was the purpose, the Court would infer the effect. So if the mode of publication would produce concealment and disguise, a fraudulent purpose would necessarily be inferred. But if the introduction of the name of Holmes is easily accounted for on other grounds;—if it is not calculated to effect that purpose;—if all the ends of publication would be as well answered with that name as without it;—if the use of it is fully explained, and it appears to have been used *ex abundanti cautela*, it is impossible in my judgment to decide that this is such an undue publication as to render the marriage invalid. The presumption of law is in favour of marriage;—a marriage *de facto* was formally solemnized in the face of the church, after publication of banns, and was followed by cohabitation.

Before the marriage act this was unquestionably a good marriage. Parties actually joined together are not lightly to be put asunder. The marriage may be of great disparity, and the connection to be lamented; yet, in natural justice, it is also to be remembered that if it were annulled, the young woman would suffer irreparable injury; hence the maxim that, *semper præsumitur pro matrimonio*, where marriage is solemnized with religious ceremony. The marriage act gives no direction as to the mode of publishing banns; it requires notice,—but does not expressly say that the marriage shall be void if the wrong names are used. But courts of law have very properly held that the very nature of banns, and the object of publication, require the names to be used, which shall give effect to them. It is laid down, therefore, that banns must be so far in the true name as to designate the person who is about to be married. Sometimes there is a difficulty in determining what is the true name. The original names are sometimes dropped, and there may be doubts as to them; but that is not the present case. Here the true names are used;—it is not a case of the omission of the true name. Three names are used. Maria is the name of baptism,—Oldacre is the name of repute; and there can be little doubt that it is the true name. The name of Holmes is interposed;—this *may* be a fraudulent interposition, and so disguise the parties as to defeat the object of publication, as was the case in *Fellowes v. Stewart*. It comes then to this; whether Holmes could have that effect. If Holmes was added to

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that of Oldacre, there might possibly have been some mistake as to the identity. But a third intermediate name is so frequently dormant, and dropped, that even her former lover, if he had heard this publication, would have known it to have been intended for her. The object however was not to disguise it from her friends:—but how any connection of Mr. Sullivan's could have been imposed upon by hearing these banns it is difficult to imagine,—for his name was rightly published. If there had been an omission of his second name Augustus, and the banns had been published for John Sullivan, and not John Augustus Sullivan, it might have concealed his identity.

On these grounds I am of opinion that the interposition of the name of Holmes is not calculated to conceal the identity of the woman. I think it was not introduced for that purpose, and could not have produced that effect. Still the Court might require the introduction of that name to be accounted for; explanation on this point is satisfactorily given. It appears that the woman was born before the marriage of her father and mother;—that they married soon after her birth;—that she was called by the father's name, and her illegitimacy was known but to few. It is not an uncommon, though it is an erroneous opinion, that the name of the mother is the only *true* name for an illegitimate child. The name of Holmes was used for caution—not to evade the law, but to make sure of using the true name. These facts satisfactorily explain the purpose for which the name was introduced.

On the whole view of the case I think the name used was not calculated to disguise the marriage, nor intended to conceal it, and that the banns were not unduly published. In this view of the case the other circumstances are not material. The Court is expressly forbidden to inquire into the residence of the parties by the act. I am not willing to enter into the consideration of other circumstances which cannot answer any good end;—they may be properly left to the good sense of the parties. I shall best discharge my duty, after the full examination this case has met with here and elsewhere, by proceeding without further remarks to affirm the sentence of the Court below.

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CONSISTORY COURT OF LONDON.

1819.  
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*April 30.*

Lady HERBERT *v.* Lord HERBERT.

A clandestine marriage between an Englishman and a Sicilian woman, celebrated in Sicily, and valid by the laws of that kingdom, held to be valid also in England.

**THIS** suit was instituted by Lady Herbert *v.* Lord Herbert for the restitution of conjugal rights.

The libel consisted of eighteen articles; and pleaded in substance—

1. That Lord Herbert, a bachelor, and aged upwards of twenty-one years, while resident at Palermo, in Sicily, in the months of June, July, and August, 1814, paid his addresses to Lady Herbert, then the widow of the prince of Butera, aged upwards of twenty-one years, and that they mutually agreed to marry each other; and that Lord Herbert, on the 17th of August, 1814, wrote a promise of marriage, and delivered it to Lady Herbert.

2. Exhibited the promise of marriage.

3. That, in pursuance of such contract, the parties on the 17th of August, 1814, were married according to the rites of the Holy Roman Catholic church, in the palace of Butera, in Palermo, by a priest of the parish of St. Nicholas, of Kalsa, in Palermo; and that in the presence of the said priest

they expressed their own free accord and consent to be married; and the priest pronounced them to be lawful husband and wife in the presence of Michael Fardelli and Francesco Onosato, who attested the same.

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4. Exhibited the certificate of the priest of the celebration of the marriage.

5. That the parish priest gave notice to the archiepiscopal Court at Palermo of the celebration of the marriage, and that such notice remains in the records of the Court.

6. Exhibited a copy of the registration of the marriage, and the identity of the parties.

7. The consummation of the marriage; and the cohabitation of the parties as man and wife, for several days in August, 1814.

8. That by the laws of Sicily, and by the decrees of the Council of Trent, A. D. 1563, which is received and obeyed as law at Palermo, and throughout all Sicily, clandestine marriages are held to be good and valid; and it is enacted that the mutual and free will of the parties contracting marriage, expressed in the presence of the priest of the parish in which one of the parties resides, and in the presence of two witnesses, is sufficient to constitute the indissoluble bond of matrimony;—and that a man and woman thus married are held to be legally united in wedlock; and that this is well known to the judges, advocates, and lawyers, practising in the Courts of Law, at Palermo, or other places in the island and kingdom of Sicily of the greatest reputation for their skill and knowledge in the laws of that country; and it is in

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strict conformity with the exposition of the law of marriages in that kingdom as laid down in the writings of authors of the greatest eminence and authority on the subject.

9. That several ordinances promulgated in the kingdom of Sicily affix a civil punishment on persons contracting clandestine marriages ; and render the husband, if of noble birth, liable to imprisonment for five years in a fortress, and the wife for the same number of years in a convent:—but these ordinances are never enforced but at the suit of the parents or guardians of parties clandestinely married ; and it is the general usage of the king, at the petition of the parties, to remit the execution of the law.

10. That Lord and Lady Herbert having mutually agreed, and freely expressed their consent to be married, and having been pronounced to be husband and wife by the priest of the parish in which they resided, in the presence of two witnesses ;—are lawful husband and wife according to the laws of Sicily, and are so known to be by the advocates and others professing the law in Sicily, and that this is in strict conformity with the law of marriages in that kingdom.

11. That Earl Pembroke, the father of Lord Herbert, arriving in Sicily shortly after the celebration of the marriage, presented a petition to the king praying the enforcement of the law against clandestine marriages ; and that by the decree of the court, Lord Herbert was on the 21st of Aug. forcibly separated from his wife, and imprisoned in the fortress of Castlemare, where he remained till

the 15th of November following, when he made his escape, and embarked for Genoa;—and that Lady Herbert was at the same time imprisoned in the convent of Stimati.

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12. That during Lord Herbert's imprisonment, he addressed letters to Lady Herbert, in which he called her his wife, and expressed the highest love and affection for her, and fully recognized the validity of his marriage.

13. Exhibited one of these letters.

14. That after the escape of Lord Herbert, Lady Herbert petitioned the Court for her release; and in the month of January, 1815, the prayer of her petition was granted, and she then went and resided for a short time with her sister, the Duchess of San Giovanni, at Naples; and afterwards proceeded with her brother (the Duke Laurino de Spinelli,) to this country, where she arrived in March last.

15. That, notwithstanding the marriage, Lord Herbert has wholly withdrawn himself from her society.

16 and 17. Pleaded the jurisdiction of the Court.

18. Prayed that the validity of the marriage might be pronounced for; and Lord Herbert might be compelled to take his wife home, and treat her with conjugal affection, and condemned in the costs of the suit.

In support of this libel forty-eight witnesses were examined, who fully proved the allegations it contained.

*Phillimore and Lushington, in support of the marriage.*

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Arnold and Swabey, contra,

Argued that if the municipal law of Sicily having authorized a separation for five years, it was impossible for the Courts of this country to decree a sentence of restitution of conjugal rights till that period had elapsed.

JUDGMENT.

SIR WILLIAM SCOTT.

This is a proceeding for the restitution of conjugal rights, brought by the Dowager Princess of Butera, in Sicily, against Lord Herbert. The parties are of noble birth, and of elevated station in their respective countries. They were both of age at the time of the marriage ;—there was no incongruity from disparity of condition or gross inequality of age. They both appear personally, and not by their guardian.

It appears that Lord Herbert was in Sicily in 1814, and introduced into the family of the Prince of Butera, the husband of this lady ; whose house was much frequented by the English nobility, who were received there with great kindness and hospitality. The prince of Butera died in June 1814—when the princess, being a widow, received attentions from Lord Herbert in a more marked and visible manner. Her sister the Duchess of San Giovanni, speaks to receiving Lord Herbert at her house, who had been before introduced to her by the Princess of Butera, and to his opening his arms and telling her that he was entitled to embrace her, as he was going to marry her sister. A contract of marriage was executed by him, which has been exhibited ;—some of

her friends appear to have entertained doubts as to the propriety of the marriage, in talking with her, and endeavouring to dissuade her from it, as not suitable : to whom she replied that that was a question for herself to decide ; that she had a right to determine for herself. Lord Herbert continued in intimacy with her, and communicated to the friends of her family his intention of marrying her. The fact of marriage took place on the 17th of August ;—it certainly was not conformable to the regular ceremonies of that country, in which, as in most other countries of Europe, solemn ceremonies are appointed. The parish priest was sent for (it appears that he was an eminent person in that country) ; two servants of the family were present ; and in their presence Lord and Lady Herbert taking hold of each other's hands declared themselves to be man and wife. This is said to be unsolemn : but all the solemnities which can attend an unsolemn marriage were observed. It was followed by the registration of the marriage : and nothing was left undone which the nature of the act would admit, by which the fact of marriage could be established.

The facts being so proved, the only question is respecting the validity of such a marriage,—whether it be valid according to the law of Sicily,—it being an established principle that every marriage must be tried according to the law of the country in which it took place :—this is according to the *jus gentium* : whatever the regulations may be, according to which the marriage has been had, if they are what the canonical law of the foreign

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country supports, the canonical law of this country must enforce it.

In proof of this witnesses have been examined, for foreign law must be established by professors of law of the country ;—the law must be produced, and it must be shewn to be the existing law of the country. (a) It is alleged that the decree of the (b) Council of Trent is the law of (c) Sicily, by which the presence of the parish priest and two witnesses are made requisite to the validity of a marriage ; but by which clandestine marriages, though illicit are notwithstanding valid and indissoluble. Four professors of the law experienced in the canonical jurisprudence of their country have been examined, and they express strongly their opinion as to the law.—The facts are too clear to be resisted : a communication took place between the parties by letters from each other ; they corresponded as husband and wife ; there is a letter from Lord Herbert in evidence, couched in the warmest and most passionate terms of conjugal affection ; co-

(a) The Decrees of the Council of Trent were received and adopted in Sicily by an ordinance of Philip II.

(b) Sess. 24. c. 1.

(c) The Council of Trent distinctly recognizes the validity of clandestine marriages. *Tametsi dubitandum non est clandestina matrimonia, libero contrahentium consensu facta, rata et vera esse matrimonia, quamdiu ea ecclesia irrita non fecit ; et proinde jure damnandi sunt illi, ut eos sancta synodus anathemate damnat, qui ea vera et rata esse negant ; quique falsò affirmant, matrimonia, à filiis familias sine consensu parentum contracta, irrita esse et parentes ea rata vel irrita facere posse : nihilominus sancta Dei ecclesia ex justissimis causis illa semper detestata est atque prohibuit. Can. et Dec. Con. Trid. Sess. 24. c. 1.*

habitation had taken place afterwards till the 23d of August.

There is, it seems, a municipal and criminal law in Sicily which looks with a jealous eye on marriages of this nature ;—it subjects the parties to imprisonment, the husband in a fortress, the wife in a convent. The seclusion of the parties from each other is a consequence of this : but its immediate operation is imprisonment ; the law does not look to a separation *a mensa et toro*.

This law has been dormant in its execution, and I suppose is seldom resorted to : but it has been enforced on the present occasion on the application of the Earl of Pembroke, the father of Lord Herbert, who was much dissatisfied with the marriage. Lord Herbert escaped from the fortress, and Lady Herbert was afterwards released from the convent on giving bail to appear if called upon. She has not been called upon, and the period for which the bail was given has almost expired.

Under these circumstances the Court is called upon by the counsel for Lord Herbert not to pronounce the ordinary sentence of the law, but to pronounce that the sentence for restitution of conjugal rights shall not take place but from a distant day ; on the ground of this municipal law of Sicily, which would enforce a separation for five years, I am called upon to inflict a penalty by the criminal law of this country.

It is admitted that there is no precedent for this, nor is there any principle on which it can be contended that this Court should form a principle of

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criminal law from a foreign country, and import it with its own jurisprudence. At whose suit too is this to be done? At the suit of the husband, who is equally involved with the wife in the offence, and who, by his counsel, now prays that his wife, in virtue of this law, may be debarred from his cohabitation. I should undertake a task, to which I am in no degree competent in point of jurisdiction, at the suit of a *particeps criminis* to put in force a law almost in oblivion in Sicily. And it is totally out of the question in this case, if I were possessed of such authority ; for the time is almost elapsed.

I have no doubt on the evidence that the lady is the lawful wife of Lord Herbert, and that he is bound to receive her in that character ; and I direct that he shall take her home and treat her with conjugal affection, and that he shall certify to this Court, by the first day of Michaelmas Term, that he has complied with this requisition of the Court.

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Costs given against Lord Herbert.

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PECULIARS' COURT OF CANTERBURY.


*The Office of the Judge promoted by Wilson v.  
M' Math.*

1819.  
Trinity  
Term,  
July 10.

**ON** the 8th of May, 1819, The Reverend Harry The right of an incumbent, to preside at a meeting of his parishioners in vestry, established.  
**Bristow Wilson, D.D., Rector of St. Mary, Aldermary,**  
in the City of London, cited Alexander M' Math, one  
of his parishioners, to appear in this Court, and  
to answer to certain articles to be exhibited against  
him for interrupting him (the said Reverend Doc-  
tor Wilson) when he had taken the chair as presi-  
dent of a vestry meeting, held in the vestry room  
of the parish of St. Mary, Aldermary, and pre-  
venting him from exercising the office of chair-  
man or president of the said vestry meeting, and  
dispossessing him thereof. On the 16th of June  
an appearance was given for M' Math, and the ar-  
ticles were now exhibited.

The third article which set forth the charge  
was as follows:

" Also we article and object to you the said  
" Alexander M' Math, That at a vestry held

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“ for the parish of Saint Mary, Aldermary, Lon-  
 “ don, aforesaid in the vestry room of the said  
 “ parish, which is within, and part of, the pa-  
 “ rish church of Saint Mary, Aldermary, afore-  
 “ said, on Tuesday, the 15th day of March,  
 “ now last past, in the present year of our  
 “ Lord, 1819, the said Reverend Harry Bris-  
 “ tow Wilson, Doctor in Divinity, the pro-  
 “ moter of our office in this cause, Nathaniel  
 “ Anger, one of the then churchwardens,  
 “ John Hamman, John Custance, William  
 “ Grave, Thomas Chandler, and you the said  
 “ Alexander M'Math, and several other of the  
 “ parishioners and inhabitants of the said parish  
 “ being then present, you the said Alexander  
 “ M'Math, neither regarding the sacredness  
 “ of the place nor the respect due to the per-  
 “ son and function of the said Reverend Harry  
 “ Bristow Wilson, Doctor in Divinity, the  
 “ Rector of the said parish, as aforesaid, did  
 “ interrupt him, the said Reverend Harry  
 “ Bristow Wilson when he had taken the  
 “ chair as president of the said vestry meeting,  
 “ prevent him from exercising the said of-  
 “ fice of chairman or president of the said  
 “ vestry meeting, and dispossess him thereof  
 “ in the indecent and unbecoming manner fol-  
 “ lowing, to wit, That the said vestry meeting  
 “ having been held, pursuant to notice duly  
 “ given in the said church, on the Sunday  
 “ preceding, the said Reverend Harry Bris-  
 “ tow Wilson attended, the same as had been  
 “ his constant practice, from the time of his

“ becoming rector of the said parish as afore-  
 “ said ; and at the appointed and usual hour  
 “ took the chair at the north end of the table  
 “ in the said vestry room, being the chairman  
 “ or president’s usual and accustomed seat.  
 “ That William Grove, one of the parishion-  
 “ ers present as aforesaid, said, ‘ I move Mr.  
 “ M’Math do take the chair.’ That you the said  
 “ Alexander M’Math thereupon took your  
 “ station at the opposite end of the said table,  
 “ and assumed the right of acting there as  
 “ chairman or president of the said meeting.  
 “ That the same being objected to by the said  
 “ Reverend Harry Bristow Wilson, and in-  
 “ sisted upon by you the said Alexander  
 “ M’Math, much altercation thereupon en-  
 “ sued, in the course of which the said Tho-  
 “ mas Chandler said, ‘ I see no use in so  
 “ much talking, it would be better to turn the  
 “ rector out of the chair ;’ or said, ‘ I pro-  
 “ pose turning the rector out of the chair,’  
 “ or to that, or the like effect. That the said  
 “ Reverend Harry Bristow Wilson, with a  
 “ view to put an end to such controversy, de-  
 “ sired the minutes of the last vestry meeting  
 “ to be read by the vestry clerk, where-  
 “ upon the vestry clerk, or a person officiating  
 “ for him, quitting his customary place by the  
 “ side of the rector, went and read the said  
 “ minutes by the side of you the said Alex-  
 “ ander M’Math ; and, the reading being  
 “ finished, you the said Alexander M’Math  
 “ interrupted the said Reverend Harry Bris-

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"tew Wilson when he was proceeding to put  
 "the question that the said minutes be con-  
 "firmed, and insisted upon putting the question  
 "yourself, which you did ; and thereupon the  
 "said Reverend Harry Bristow Wilson, find-  
 "ing himself completely dispossessed of the  
 "chair to avoid further contention retired from  
 "the room, whereby you, the said Alexander  
 "M'Math, ousted the said Reverend Harry  
 "Bristow Wilson of the office of chairman or  
 "president of the said vestry meeting in ma-  
 "nifest violation of the laws and constitutions  
 "ecclesiastical of this realm, and of what is  
 "fitting and right to be observed, and in fact is  
 "observed in and throughout the whole realm,  
 "touching and concerning the premises, and  
 "to the evil example of others."

*Adams in opposition to the admission of the ar-  
 ticles.*

There is no charge that the party proceeded against acted in an intemperate manner: there was nothing of altercation in his conduct ; he only acted in consequence of the vote of the vestry meeting that he should be chairman. The charge is that the rector was dispossessed of the chair in manifest violation of the Ecclesiastical Laws and Constitution of this realm. Nothing particular is stated as to the business for which the vestry was held : the question, therefore, is raised generally with respect to all vestries ;—it is not put on the ground of courtesy or propriety, but claimed as a right ; it becomes therefore very important. Vestries are held for a variety of purposes ; and it is usual, and not unfit,

that the clergyman should preside at them ; and it is better that the matter should be left on general courtesy and comity than put as an absolute right. Not only I do not find any authority for this doctrine ; but there is no canon or constitution pointed out, only a general reference to canons and constitutions. Our opponents must shew some right which the Ecclesiastical Laws can enforce.

It would be extremely inconvenient if it were an absolute right.

In case of non-residents what is to be done ? Is the clergyman to depute ? And, in the case of an absolute right, how can any one act without a deputation ? or how can the parishioners have a right contingent on their clergyman's absence ? If the incumbent is not present at the beginning, and a chairman is appointed,—what is then to be done ? Must the other be displaced ? or are the acts done qualified or affected by the absence of the incumbent ? It cannot be sustained on the notion of any exclusive or peculiar interest ;—others contribute to the rates as well as he ;—no doubt he has a right to be present, because he is interested as well as others ; though at the same time his right to be present has been questioned. It is highly proper, laudable, and decent, that the incumbent should preside at such a meeting : but he has no right to do so. If any one has a *right* to preside, then all do not meet on an equal footing ;—it is incident to such an office to judge when and how the question is to be put, and to give the casting vote.

It is not easy to collect any thing specific on such a point from decided cases. There is one case, how-

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ever, that of *Stoughton v. Reynolds and Strange*, (a) in which the point appears to have come in question.

*Per Curiam.*

Was not the question there entirely on the right of adjournment?

*Adams.*

Principally : but the right of presiding was also adverted to by Lord Hardwicke ; and he seems to have laid it down that the incumbent had no right to preside.

Unpleasant consequences may result from the agitation of this question : but it is one over which the Court can have no jurisdiction.

*Lushington on the same side.*

This is an attempt unprecedented since the days of the High Commission ; the locality of the act is the only circumstance which can give this Court the appearance of authority. If it had taken place in an unconsecrated place, it clearly could have none. The adverse party must shew,—1st. That the incumbent had a right to preside. 2nd. That it is an ecclesiastical offence to dispossess him. And, 3rd. That he was actually dispossessed. A citation from Shaw's Parish Law, which is to be found in Burn (b), will

(a) *Strange* 1045.

(b) Anciently, at the Common Law, every parishioner, who paid to the church rates, or scot and lot, and no other person, had a right to come to these meetings : but this must not be understood of the minister, who hath a special duty incumbent on him in this matter, and must be responsible to the bishop for his care therein. And, therefore, in every parish meeting *he presides* for the regulating and directing this affair ; and this

probably be relied upon : but that is a mere assertion of Burn's, and not to be found in the book to which he refers.

In the act (c) passed lately for the regulation of special vestries, if the rector, vicar, or perpetual curate, is not present, the parishioners are to choose a chairman, which seems as if the legislature considered that the right did not exist, and this act passed rather for parochial affairs and the management of the poor. The right cannot be supported unless authority can be produced for it : but the authorities shew that all the parishioners have a right to vote equally, and that the majority is binding on all questions.

The case of Stoughton and Reynolds is even stronger, as reported by Cases temp. (d) Hardwicke, than in Strange.

If the incumbent has no right, there can be no offence : if he has a right, it is by Common Law or custom ; and then having been dispossessed peaceably, and without brawling, it is not an offence cognizable in this Court. We have no authority to try the question ; the remedy must be sought elsewhere, and by a civil proceeding. As no violence has been used, there can be no criminal jurisdiction even at Common Law.

That the majority binds the whole is a rule without any limitation : in all assemblies the choice of president is in the majority.

equally holds whether he be rector or vicar. Par. L. c. 14.  
4 Burn's Ecclesiastical Law, p. 9.

(c) Stat. 58 Geo. III. c. 69.

(d) Page 276.

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probably be relied upon : but that is a mere assertion of Burn's, and not to be found in the book to which he refers.

In the act (c) passed lately for the regulation of special vestries, if the rector, vicar, or parson, or curate, is not present, the parishioners are to elect a chairman, which seems as if the legislature considered that the right did not exist, and was passed rather for parochial affairs and the management of the poor. The right cannot be shown unless authority can be produced for it : the authorities shew that all the parishioners have a right to vote equally, and that the majority is to prevail on all questions.

The case of Stoughton and Reynolds is stronger, as reported by Cases temp. Henry, than in Strange.

If the incumbent has no right, it is no offence : if he has a right, it is by law or custom ; and then having it, he may exercise it peaceably, and without brawling, and is cognizable in this Court. We are to try the question ; the remedy is not to be sought elsewhere, and by a civil process. If violence has been used, there is no jurisdiction even at Common Law.

That the majority have no right to elect out any limitation : in the case of the president of the majority.



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*Phillimore and J. Adlams for the Incumbent.*

This is a novel attempt on the part of the parishioners of this parish, an attempt pregnant with mischief and disorder, to take from the head of them the exercise of a function to which the parochial clergy of this country have been entitled by general law, by usage, and by practice, from all time:—a right which has never been before called in question in any court.

Objection is taken to the jurisdiction:—but no ground is laid for any such objection. The offence is against an ecclesiastical person, in an assembly convened for ecclesiastical purposes in an ecclesiastical place. This Court has an inherent jurisdiction essentially, and from its constitution over the subject matter, to take notice of a gross breach of decorum against such a person in such a place. He could have no remedy except here. We have our unwritten as well as our written law; and if we could not proceed without the authority of a canon or of a constitution, we should be every day exceeding our authority.

In many points the ecclesiastical jurisdiction is exercised in the administration of unwritten law, as in the power of ordinaries, their jurisdiction over churchwardens and clerks. Nor will it be asserted that in cases of disturbance in churches they had not a jurisdiction antecedent to the stat. of Edw VI. (a)

This office devolves on the incumbent from the nature of his functions;—it is connected with the constitution and discipline of the church; and the

(a) Clarke's Praxis, tit 132.

denial of it is pregnant with mischief. From the earliest times of the Christian Church the clergyman *virtute officii* presided in the assemblies:— in the early writers they are called presidents. Tertullian mentions them as those who “presided over their assemblies.” Justin Martyr styles them *presidents*. In Lynwood they are termed “*Præsidentes Ecclesiarum et Capellarum*.” The very word rector implies governing in matters concerning the parish. When he receives induction, he is given “*the real and corporal possession of the church with all the rights, profits, and appurtenances thereto belonging.*” In the instrument of collation “*the government of the church is conferred on him.*” The government of a rector in his parish is analogous to that of a bishop in his diocese; in the canon law the word *diæcesis* being applied to a parish. Among the constitutions, adopted by the settlers in North America, in Charles the First’s time, we find that a minister was always to preside in the meetings of each parish. (a) And it is but fair to presume that these emigrants carried with them the same regulations which they had observed in their mother country. Burn lays it down that the minister *presides* in every parish meeting. It is said this is not in Shaw’s Parish Law: but it is quite sufficient for our purpose that it is in Burn, for he is of considerable authority on such a point. Prideaux lays down the same doctrine: speaking of rates, he says, in every parish meeting the incumbent shall preside to regulate this

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(a) Collier’s Ecclesiastical History, Appendix, p. 112.

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matter. In 58 Geo. III. c. 69. (a), a statute passed after much discussion, it appears clearly to have been the opinion of the legislature that the right was in the incumbent. In the appointment of select vestries provision is always made that the clergyman shall preside over them, The case of *Stoughton v. Reynolds* was whether an incumbent had the power of adjourning a vestry meeting against the wishes of a majority; and that too in a case in which, if in any, a minister ought not to preside, for he had nominated his own churchwarden. And the question then was, about the choice of the second churchwarden who was to be nominated by the parishioners without any interference of the vicar.

The difficulty of our case is to argue in support of that which has never before been opposed.

The Court took time to deliberate.

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The registrar stated to the Court that he had been served with a notice that a rule had been granted by the Court of King's Bench to shew cause why a prohibition should not be granted in this cause; and that in the mean time proceedings shall be stayed in this Court.


(a) And for the more orderly conduct of vestries be it further enacted, that if the rector, or vicar, or perpetual curate, shall not be present, the persons so assembled in pursuance of such notice shall forthwith nominate and appoint by plurality of votes, to be ascertained as hereinafter is directed, one of the inhabitants of such parish to be the chairman, and preside in every such vestry, &c. &c. 58 Geo. III. c. 69. s. 2.

JUDGMENT.

Sir JOHN NICHOLL.

After such notice, I shall, of course, suspend proceedings for the present : at the same time, as the suit has stood over for the convenience of the Court, in delivering its judgment on the admissibility of the articles, which judgment would otherwise have been given before the long vacation, I think it but due in justice to the parties, to state the impression of my mind on the question, after having heard it argued at length, and given it much subsequent deliberation.

It is a suit by the rector of St. Mary Aldermary, in the city of London, against a parishioner of that parish for disturbing him in presiding at a vestry meeting. The offence is thus charged in the citation :—" More especially for interrupting the rector when he had taken the chair as president, at a vestry meeting, held in the vestry room within the church of the said parish, preventing him from exercising the office of chairman or president at the said vestry meeting, and dispossessing him thereof." To this citation an appearance was given on the part of Mr. M'Math, the person cited. The appearance was absolute, and not under protest ; and articles were prayed and given in, stating that Mr. M'Math, at a vestry held for the parish of St. Mary Aldermary, in the vestry-room, which is within and part of the parish church, on the 15th of last March, did interrupt the rector when he had taken the chair as president of the vestry, did prevent him from exercising the office of chairman or president of the vestry, and did dis-

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possess him thereof, in the manner there set forth, which it is not now necessary more particularly to notice.

The admissibility of these articles was opposed and debated; and the objections to them, as far as I could collect, stood on two grounds :—

1. That the minister, as such, has no right to preside at a vestry meeting ; and, consequently, that the interrupting him in so doing is not a disturbance.

2. That, even if it be a disturbance, this Court has no jurisdiction to repress or punish it as an offence.

It has been stated that the suit is brought to ascertain the *right* of the minister to preside at these meetings, and not from animosity or vindictiveness on account of the particular transaction ; and, indeed, the form of the suit, and the manner in which the question has been treated on both sides, tend very much to confirm that statement. There are certain circumstances set forth in the articles, which possibly might have warranted the party in bringing a different suit : but the present mode has been adopted in order to bring the general question to issue.

The question is certainly one of considerable importance, both as affecting the station of a highly respected class of the community, the established clergy ; and as affecting the peaceable and orderly proceedings of parochial meetings. The case is said to be a new one, so far as regards any express law, or any judicial decision on the subject. There is no statute, no canon, no reported judg-



ment, either *expressly* affirming or *expressly* negating the right. It nevertheless may exist as a part of the *Common Law of the Land*, as a part of the *Lex non scripta*, which is of binding authority, as much in the Ecclesiastical as in the Temporal Courts. Indeed the whole Canon Law rests for its authority in this country upon received usage: it is not binding *here proprio vigore*. Moreover this Court upon many points is governed, in the absence of express statute or canon, by the *Jus tacito et illiterato hominum consensu et moribus expressum*.

It is true that generally the existence of this *jus non scriptum* is ascertained by Reports of adjudged cases: but it may be proved by other means; it may be proved by public notoriety, or be deducible from principles and analogy, or be shewn by legislative recognitions. Published Reports of the decisions of Ecclesiastical Courts (with one very recent exception) do not exist; and if they did, yet the particular right in dispute may never have been so much as doubted or questioned before. And some countenance is given to that notion from the *general usage and practice* of the kingdom; for it is pleaded in the articles, and on their admissibility must be taken as true, that the minister's presiding at vestry meetings "is observed in and throughout the whole realm." The fact of such *general usage* for the minister so to preside is notorious, and has not been denied even in argument. Now such an usage (unless absurd or improper) I take to found a Common Law right.

Law writers, particularly Mr. Justice Blackstone, lay it down that "general customs, which are

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the universal rule of the whole kingdom, form the Common Law, in its stricter and more usual signification." Again, "the first ground and chief corner stone of the laws of England is immemorial custom."

Then, the general immemorial usage being averred, is it a *reasonable* usage? For "the Common Law," says Blackstone, "is the perfection of reason; what is not reason is not law:" adding, however, "that the particular reason of every rule of law cannot be always assigned. It is sufficient that there be nothing in the rule flatly contradictory to reason, and then the law will presume the rule to be well founded." Now this general usage, so far from being "flatly contradictory to reason," is admitted to be extremely proper. The propriety of the minister's presiding at vestries was in no degree controverted; all that was contended was, that it ought to be accepted as a *courtesy*, and not claimed as a right, for that the right of choosing a chairman belonged to the parishioners, and that the minister was present *merely as a parishioner*, having no greater right to preside than any other individual.

The practical inconvenience of the rule thus contended for is obvious and manifest. At meetings held so frequently as vestries are in many parishes, often very numerous attended, and where every parishioner paying rates has a vote, if the election of a chairman were always a preliminary measure, the consequence would be, that in parishes where animosities and divisions unfortunately existed, a large portion of the time for the transaction of

business would be consumed in preliminary contest; and the business of managing the concerns of the church and poor, in which the feelings of piety and benevolence are so desirable, would be preceded by a conflict exciting all the angry passions of man.

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To avoid these practical inconveniencies, as well as from other considerations of propriety and principle, the universal usage of the minister's presiding probably took its rise; for in every view the propriety is manifest, and the right is founded on sound principle.

The minister is *not*, in consideration of law, a mere individual of vestry, as has been contended: nor is he in any instance so described. On the contrary he is always described as the first, and as an integral, part of the parish. The form of citing a parish proves this position, namely, as "the *minister*, churchwardens, and parishioners," he being *specially* named.—Such is the legal description of a parish in all formal processes.

So, again, in the choice of churchwardens; if the minister and parishioners cannot agree in the choice of the two, the *minister* is to choose one, and the parishioners the other, unless controlled by special custom.

So, again, churchwardens are directed by the canon to account before the *minister* and parishioners.

So far, therefore, from being a mere individual, the proper description of a parish, in vestry assembled, is "the *minister*, churchwardens, and parishioners in vestry assembled." The minister

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is denominated the *rector parochiæ*, the *præses ecclesiasticus*. The vestry itself is an ecclesiastical meeting, of an ecclesiastical district, namely, a parish—it is held in an ecclesiastical place, in the church, or in a room which is part of the church, part of the consecrated building, from which the meeting itself takes its name of *vestry*, as being (*a*) held in the room where the priest puts on his *vestments*. It meets for an ecclesiastical purpose; for, though the sustentation of the poor is now carried on by rates, and overseers are appointed under special statutes, so that it has, in modern times, become more of a temporal concern, yet anciently it was a matter immediately of ecclesiastical duty and superintendence. So says *Prideaux* (*b*) “The churchwardens were anciently the sole overseers of the poor: and it lay wholly on them, *under the direction of the minister*, to take care of all such as were in want,” &c.

In these meetings, then, of the parish, consisting of “minister, churchwardens, and parishioners,” assembled in the church for an ecclesiastical purpose, that the *rector parochiæ* should *not* preside, but be considered as a mere individual, would be most strangely incongruous; and that he and any other individual should be put in competition for the office of chairman would be placing him in a degraded situation, in which he is not placed by the *constitutional* establishment of this country. On sound legal principle, he is the head and *præses* of the meeting.

(*a*) Par. L. c. 17. 4 Burn 8.

(*b*) Directions to Churchwardens, p. 19, 20.

To pronounce then against a right thus founded in usage, and supported by reason, convenience, and propriety, it would require some very clear and decided *authority* negating the right, and establishing a different rule. The single authority resorted to is the case of "*Stoughton versus Reynolds*:" and that, indeed, was hardly relied upon as sufficient; for the argument went rather upon the absence of direct authority to support the right, than upon the adduction of any sufficient authority to negative it. The case of "*Stoughton against Reynolds*" did not at all turn upon the right to *preside*, but upon the right of the chairman to *adjourn*. The question was, whether the minister presiding had a right to adjourn the meeting so as to prevent the election of a second churchwarden by the parishioners, he himself having previously nominated the first churchwarden. I have looked into the three reports of that case, (*b*) which are to be found in Sir John Strange, in Fortescue, and in the cases during the time of Lord Hardwicke. They are in some degree different: but in neither is it stated that the right of the minister to *preside* made any part of the argument. In all the sole question was, the chairman's right to *adjourn* the meeting; and it was held that the question of adjournment should have been decided, as it generally is, by vote, and not by the chairman. It is obvious that this question of adjournment must have assumed exactly the same shape, and have led to exactly the same conclusion, whether the minister had

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(*b*) 2 Str. 1045. Fortescue 168. Cas. temp. Hard. 274.

~~THE~~ DETERMINED IN THE

~~the~~ election or chairman by of  
~~the~~ ~~power~~ thrown out, in a case like  
~~the~~ right of presiding, must have been  
~~the~~ dictum upon a point not then re-  
~~the~~ decision, nor even arising in argument.  
As ~~the~~ report Lord Hardwicke is made to say,  
~~the~~ the general apprehension is, that the mi-  
~~the~~ nister has a right to preside, but that he knows of  
no authority for it."—This is in Ca. temp. Hardw.  
That observation is somewhat different in *For-  
rescue's Reports*. There it is said, "Supposing  
that the minister has a power of presiding, it does  
not follow that he has a power of adjourning." In  
*Strange* it is only said, "As to the vicar he seems  
to have no share in the election of the *second*  
churchwarden, nor to have any right to preside."  
—And, to be sure, if there was any case in which  
he ought to have retired from the chair, it was at  
the election of a *second* churchwarden, with which  
he had nothing at all to do.

A doctrine of this sort, however high the source  
from whence it flows, yet being on a point not  
raised in argument, not important to the decision,  
belonging not to the law familiar in that Court,  
but to another jurisdiction, is not of any very con-  
clusive and binding authority. And yet it is the  
only one leading in any degree to negative the  
right of the Minister against those other consi-  
derations which I have already stated.

Whether the question has ever been raised in  
these Courts is uncertain, from the want of re-  
ported cases: but that no decision *negating* the  
right has ever taken place would be no extravagant

inference to be drawn from the prevalence of the practice of the minister's presiding, coupled with general impression of his right to do so. Writers on ecclesiastical matters partake of the same impression—not only Burn holds this, but Prideaux, whose work on the duties of churchwardens has always been held in these Courts to be of considerable authority.—He is express upon the subject. First he mentions the regular mode of calling a vestry: (c) “When any such thing is to be proposed to the parishioners, the churchwardens, *with the consent of the minister*, call a meeting of the parish.” And again, in speaking of the rates (d), he says, “They only who pay to the rates should make the rates, &c.: but this must not be understood of the minister, though he be not charged to those rates, because, as having the freehold of the church, he hath a special right in it, and as minister of it, he hath a special duty upon him to see that it be well and duly repaired, and that rates be made to enable the churchwardens to do it.—And, therefore, *in every parish meeting he presides*, for the regulating and directing of this matter.”—This authority, then, as far as it goes, is direct and express. It is not indeed of the same weight as an adjudged case, or a canon; but it is the understanding of a learned person, himself filling a judicial situation.

The last authority that I shall mention, however, is of greater weight—the recognition of the Legislature.—In several parishes select vestries have

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(c) P. 31.

(d) P. 35.

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been constituted, under special Acts of Parliament, where, from the extent of the population, the business could not well be conducted by the whole parish. One can see no strong reason why, in such a select vestry, the minister should be appointed chairman, except upon the ground of his general right, and the propriety of the thing itself. The election of a chairman at a select vestry would take but little time, and would not be likely to be attended with conflict and animosity. And yet, as far as I am aware, it is the constant course of the Legislature, in Acts for appointing select vestries for the management of the *general* concerns of a parish, to direct that the minister shall preside in such select vestry. Be that as it may in these particular cases, the late Act, for the regulation of vestries *generally*, appears to contain so strong a recognition of the right, as almost by necessary implication to declare that it is in the minister; while the subsequent Act for creating select vestries, *for a special purpose*, in no degree derogates from the general rule, but tends, as an exception, to prove and support it.

The first of these Acts, that of the 58th of the King, chapter 69, is intituled an Act for the regulation of Parish Vestries. The 1st section directs the mode of calling vestries: and the 2d section says, "for the more orderly conduct of vestries, be it enacted, that in case the rector or vicar or perpetual curate shall *not be present*, the persons so assembled shall forthwith nominate, by plurality of votes, one of the inhabitants to be chairman." Now this is nearly tantamount to a declaration, or



by necessary implication declares, that if the rector, vicar, or perpetual curate *be present*, he shall preside : and the Legislature must evidently have considered that by law and usage he was entitled to preside. It is only in case of his absence that the parishioners are directed to choose a chairman : and, consequently, when he is present, he is the chairman of course. I can construe the Act in no other way.

It is true that the parishes of London and Southwark are excepted out of this Act. Now, supposing that exception to apply to every clause of the Act, still that would only go the length of providing that if any special custom, any vestry in London, or Southwark, had the right of choosing a chairman, notwithstanding the presence of the minister, this Act would not deprive them of the right under such special custom : but otherwise, London and Southwark must be presumed to stand on the same footing, in this respect, as the rest of the kingdom.

The Act of last Session (59 Geo. III. c. 12.,) does not diminish this inference. It is intituled "An Act to amend the Laws for the relief of the Poor." By this Act a power is given to parishes to establish select vestries *for the concerns of the poor*, the principal object being to render unnecessary the interference of magistrates on every application for relief ; and with this view the parish vestry may elect a certain number of persons not exceeding twenty-five ; and the minister, churchwardens, and overseers, with those elected persons, shall manage *the concerns of the poor*. Now this

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is not a select vestry for general parochial purposes, but for those particular concerns. The maintenance of the poor is now, in some places, become so heavy a burthen upon *property*, and so much more a matter of *temporal* than of *spiritual* concern, that in a parish committee, specially appointed for that purpose, where possibly the minister, as a *payer of rates*, may have little or no interest, it may be fitting enough to leave the choice of their chairman to these select persons, which would not be likely to produce any disturbance or conflict; and so the Legislature has provided. But this does not derogate from the propriety, or weaken the inference of the former act, that in all *other* vestries held for general parochial purposes, the minister is still to preside.

Upon the whole, I am by no means prepared to negative the right of the minister, supported as it is by usage and propriety, laid down by some writers, and recognized, and thus in effect declared, by the Legislature itself.

And in a case where the minister was in the actual possession of the chair, I think that the defendant, upon the facts stated in the articles, is to be considered, by his interruption, as an unlawful disturber.

The other point is whether this is a matter of ecclesiastical jurisdiction, and to be proceeded against as an ecclesiastical offence?

Now, this being a disturbance of the minister in the exercise of a function belonging to him in his ecclesiastical character at a meeting of an ec-

clesiastical district (for a parish is such a district)—  
a meeting held for general ecclesiastical purposes—  
and in an ecclesiastical place, a consecrated place,  
the church, or vestry of the church ; it seems to  
me that it must be of ecclesiastical jurisdiction  
and cognizance. I apprehend that such *rights*,  
and such *places*, and the orderly conduct of such  
*meetings*, are under the protection and guardianship  
of the Ecclesiastical Laws. It has not been  
pointed out to this Court how any other Court  
can interfere, or how redress can be procured  
elsewhere. It seems as much an offence of eccle-  
siastical jurisdiction as the erecting tombstones in  
a churchyard, or the pulling down tombstones, or  
breaking a door into a churchyard, or neglecting  
to repair a chancel, or setting up arms in the  
church, or forbidding the organ to be played  
when directed by the minister, or many other mat-  
ters which are proceeded upon in these courts,  
though there is no express canon or statute upon  
the particular subject. Yet in all cases of this  
sort the proceeding is in the Ecclesiastical Court,  
and in the form of articles as for an offence,  
which mode of proceeding is in a great degree  
like an indictment at Common Law for a misde-  
meanor, where no statutory sanction is provided  
to enforce any thing enjoined, or to restrain any  
thing prohibited.

Some cases of the sort to which I have al-  
luded have occurred within my memory in these  
Courts ; and I will here mention two or three of  
them.

1. *Cade* against *Newnham*, in the Consistory of

1819.  
*Michaelmas*  
*Term.*  
~~~~~  
WILSON
v.
M^r MATH.

1819.
Michaelmas
Term.

 WILSON
 v.
 M'MATH.

London, 1786. There a person was articted against for opening a door into a churchyard. An appearance was given under protest to the jurisdiction: but the protest was overruled, and the suit proceeded in this form.

2. *Seger and Hill* against the *Dean and Chapter of Christ Church*, in the Court of Peculiars, 1787. This was a suit for not repairing the Chancel of Harrow-on-the-Hill, and the proceeding was by articles.

3. *Burton and Edwards* against *Calcott*, in the Consistory, 1788. These were articles for erecting a tombstone in Kensington Church-yard, and for pulling down another in the same church-yard. The Court said, it was "*committing a nuisance in the church-yard*," and as such was an ecclesiastical offence, and subject to the jurisdiction of the Ecclesiastical Court.

4. *Maidman* against *Malpas*, in the Consistory, 1794. These were articles for erecting a monument without the consent of the rector. An appearance was given under protest, which was overruled, with costs.

5. *Hutchins* against *Denzilow*, in the Consistory, Michaelmas Term, 1791. This case is an authority not wholly inapplicable to the present proceedings; and I shall, therefore, state it a little more at length. It was a proceeding against the churchwardens by articles; and the offence was thus stated in the citation, "more especially for obstructing and prohibiting by your own pretended power and authority, and declaring your resolution to continue to obstruct and prohibit the

singing or chaunting by the parish clerk and children of the ward and congregation, accompanied by the organ." The churchwardens supposed that as they paid the organist and managed the children, they were to direct when the organ should play or not play, and when the children should or should not chaunt. The clergyman had ordered the playing and singing at certain parts of the service. The churchwardens forbade both; not in the church, but privately, so that there was no brawling or public indecency: but the offence was set forth in the articles conformably to the citation which I have just stated. Many objections were taken to the admissibility of the articles: among others (as in the present instance) it was said, that no law was specially set forth as having been violated. But the Court said, "where the *general* law is relied upon, it is not necessary to plead it."—Again, it was objected, that the fact charged was not of a criminal nature (as is also contended in the present case): but to this the Court replied, "that the right of directing the service was in the minister; and the churchwardens obstructing him in the exercise of that right, was an offence, an usurpation of his right, which might be proceeded against in the Ecclesiastical Court."

The preceding are cases within my own recollection in these Courts; the same thing is to be inferred from some reported cases in prohibition. I shall only notice one, that of *Palmer versus The Bishop of Exeter*.—(a) Sir Tho-

1810.
Michaelmas
Term.
WILSON
v.
M'MATH.

(c) 1 Strange 776.

CASES DETERMINED IN THE

Ordinary set up his arms in the church of St. James's, Exeter. The ordinary promoted a suit in the Ecclesiastical Court to deface them. A prohibition was moved for and refused; and Justices Eyre and Fortescue said, "the ordinary was judge what ornaments were proper, and might order them to be defaced."

Now all these cases were proceedings by articles. I take it even the last was: and most of them, if not all, for offences under the general principles of Ecclesiastical Law, and not under any precise canon or statute. The remedy is a very lenient one; for however high-sounding some of the expressions in the articles may be, such as "touching and concerning your soul's health, and the lawful correction and reformation of your manners and excesses," the only effect of a sentence, as prayed, would be to admonish the party to forbear in future from the like disturbance and interruption; and, perhaps, to make him pay the costs: but as to costs, it always lies in the discretion of the Court to mitigate them, as the circumstances of the case may appear justly to require.

Such is the view that I should take of this question, if it fell to my lot to determine it. It is certainly desirable that the point should be settled. It is probable that the opinion of this court may not be final; and it would be highly satisfactory to my mind that it should be settled by a superior tribunal, either in the way of appeal or of prohibition: but at present, after mature and careful consideration, forming the best judgment I am

able on the subject, I am of opinion, on the grounds already stated, that the articles ought to be admitted.

But a rule to shew cause why prohibition should not issue, having been served on this Court, it is my duty not to proceed to admit the articles. I have, however, thought it respectful to state my opinion for the consideration of the Court of Common Law. If they should differ from me, I shall bow to their better judgment with every possible degree of deference and respect.

1819.
Michaelmas
Term.



WILSON
v.
M'ATH.

The admission of the articles was accordingly ordered to stand over.

The registrar stated that the rule which had been granted by the Court of King's Bench to shew cause why a prohibition should not issue to this Court in this cause, had been discharged with costs. (f)

Michaelmas
Term,
Dec. 4.

Phillimore and J. Addams,

In moving that the articles should be admitted, prayed to amend the article which stated the fact charged, by substituting Tuesday the 16th of March for Tuesday the 15th of March.

Adams and Lushington, contrd.

The error is fatal; the fact must be proved as

1819.
Michaelmas
Term.

WILSON
v.
M'MATH.

laid. In *Thorpe v. Mansell* (g), for such an omission the suit was dismissed with costs. Oughton tit. 59. The same rule exists in other courts. (h) An indictment could not hold on an error in the name. Viner's Abr. Abatement.

JUDGMENT.

SIR JOHN NICHOLL.

I have not the least doubt but that, before the articles are admitted, the amendment may be made. It is a material distinction in our practice from that of the Courts of Common Law, that this Court has the power of reforming the articles; for we here debate the admissibility of them, and that is the very question before me. In the case cited the articles had been admitted, and the issue given.

The alteration is the slightest possible:—when it is made I shall admit the articles for the reasons I stated at length on a former day.

I shall only state my anxious hope that if, as has been stated, this question has been brought forward merely to try the question of right, it will be brought to the shortest conclusion, and that all unnecessary expense will be avoided. If the party wishes to take the opinion of the Court of Delegates, the shortest and least expensive mode will be to appeal from the admission of the articles.

1820.
Hilary
Term,
January 20.

An affirmative issue was given by Mr. M'Math to these articles.

(g) Consistory of London, July 20, 1810.

(h) 1 Viner Abr. 8.

The judge pronounced that Alexander M'Math had interrupted the Reverend H. B. Wilson, D. D. when he had taken the chair, as president, at a vestry meeting held within the walls of the parish church of St. Mary, Aldermary, and prevented him from exercising the office of chairman or president of the said vestry meeting, and dispossessed him thereof as pleaded in the articles; and condemned the said Alexander M'Math in costs; and decreed a monition against him to abstain from such conduct in future.

1820.
Hilary
Term,
Jan. 27.
~~~~~  
WILSON  
v.  
M'MATH.

PREROGATIVE COURT OF CANTERBURY.

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1819.

*Michaelmas  
Term,  
Nov. 15.*

In the Goods of JOANNA WILKINSON, Deceased.

***PER CURIAM.***

A married woman has taken probate without the consent of her husband ;—the husband is now consenting to its being revoked, and she brings in an affidavit that she has not intermeddled with the effects.—I shall allow the probate to be brought in and revoked, and the administration with the will annexed to be granted to the residuary legatees.

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## ARCHES COURT OF CANTERBURY.

ROPER v. ROPER.

1818.  
*Michaelmas*  
*Term,*  
*Dec. 5.***JUDGMENT.**

Sir JOHN NICHOLL.

This suit is brought by the wife for cruel conduct on the part of her husband. The libel had entered into a detail of circumstances; and pleaded the abuse of her family by the husband. In such a case the Court would be unwilling to narrow the husband in his defence. Both the articles objected to are offered, not as affording evidence of misconduct; but rather as explanatory of the general character and complexion of these family quarrels.—I think it, therefore, proper to admit these articles, though the matter may not be strictly evidence; especially as I understand that the father and mother are to be examined upon them;—they may shew the spirit with which they give their evidence, and tend to elucidate the nature of these family quarrels.

I will not anticipate how circumstances may more specifically bear upon the case. Perhaps it would

Two explanatory articles, in a responsive allegation, admitted.

CASES DETERMINED IN THE

have been better if they had been brought forward by interrogatories than by plea : but I will not shut them out ; as they may support the defence of the husband which may depend on what may be stated by the witnesses of the family. Though there might be objections under other circumstances, in this case it is quite proper that they should be admitted.

1818.  
*Michaelmas*  
*Term,*  
*Dec. 5.*

HALFORD *v.* HALFORD.

An exceptive  
allegation  
rejected.

JUDGMENT.

Sir JOHN NICHOLL.

The question arises on the admissibility of an exceptive allegation.—Although the party accused is not to be narrowed in her defence ; yet exceptive allegations are always to be watched with jealousy ; and more so when they are offered by the wife, because she has not the ordinary check of costs.

The wife has given in a defensive plea, on which she has examined fifteen witnesses.

The Court exercises a greater discretion over exceptive allegations, after publication, in a cause ; because it can then see more of the general character of the case, and what facts bear upon the general issue of the cause.

After publication the party is at liberty to plead specific facts contradictory to the testimony of the witnesses ; which facts, owing to the generality of the adverse plea, it could not have met before :— for instance, if general familiarities are pleaded, and under this head an important specific fact is introduced, which the party can have had no opportunity of contradicting before publication ; then it is allowed, for the purposes of just defence, to shew, after publication, that it is untrue.

The present allegation is of a very slight kind.

The first article pleads that no credit ought to be given to the depositions of Margaret Stewart, produced as a witness on behalf of Mr. Halford ; for that, on referring to the original deposition of the said Margaret Stewart, on the libel, she has towards the close of tenth article deposed.

“ And further to the said article the deponent cannot depose ; except, that after “ she had made the discovery of Sir Thomas “ Staines leaving his bed-room of a night ; “ and, as near as she can recollect, some time “ in the month of July, she, the deponent, “ was engaged one day in settling some accounts with Thomas Birch, the bailiff of her “ brother’s farm, at Dandelion, (which she was “ frequently engaged in doing with him for several hours at a time) ; and the said Thomas “ Birch, who has been many years in the family, then told the deponent, in confidence, “ and with apparent great concern, that he, “ and several of the men employed about the “ farm, had seen Mrs. Richard Halford and

1818.  
*Michaelmas*  
*Term.*  
HALFORD  
v.  
HALFORD.

1818.  
*Michaelmas*  
*Term.*

HALFORD  
 v.  
 HALFORD.

“ Sir Thomas Staines lying together on a  
 “ hay-pent in the hayfield ; and that they re-  
 “ mained there for above an hour. The de-  
 “ ponent heard what Thomas Birch had to  
 “ say upon the subject ; and in reply merely  
 “ expressed her concern at what he had told  
 “ her ; but did not communicate to him any  
 “ of the circumstances of criminality within  
 “ her knowledge, as before deposed.’ Now  
 “ the said Margaret Stewart, widow, hath,  
 “ in her said deposition, knowingly and wil-  
 “ fully sworn and deposed falsely and untruly ;  
 “ for that, in truth and fact, the said Thomas  
 “ Birch did not, at the time mentioned and  
 “ intended in the said deposition, or at any  
 “ other time, tell or inform the said Margaret  
 “ Stewart in confidence, and with apparent  
 “ great or any concern, that he and several  
 “ of the men employed about the farm had  
 “ seen Mrs. Richard Halford and Sir Thomas  
 “ Staines lying together on a haypent in the  
 “ hayfield, and that they remained there for  
 “ about an hour, or to that or the like effect.  
 “ And that the party proponent doth further  
 “ allege and propound, as the truth and fact  
 “ was and is, that on a day happening in the  
 “ month of June in the said year 1816, being  
 “ the day meant and intended by the said Mar-  
 “ garet Stewart in her said deposition, the  
 “ said Thomas Birch (who is bailiff to the  
 “ said Sir Thomas Staines) being in the hay-  
 “ field near the house of the said Sir Thomas  
 “ Staines, at Dandelion, aforesaid, with seven-

"teen or eighteen workmen; the said Sir  
 "Thomas Staines came into the field to see  
 "them make and carry the hay. That some  
 "little time afterwards the said Sarah Hal-  
 "ford, accompanied by her son, Robert Hal-  
 "ford, a boy of upwards of ten years of age,  
 "came into the said hayfield, and joined the  
 "said Sir Thomas Staines. That after walking  
 "for some time amongst the work-people,  
 "and talking to, and asking them questions,  
 "they the said Sir Thomas Staines and Sarah  
 "Halford sat down on a haypent, removing  
 "from one to another, as the same were cleared  
 "or carted away, the said Robert Halford  
 "being constantly with them, and sitting by  
 "or between them, That the said Thomas  
 "Birch being shortly after sent for by the said  
 "Margaret Stewart to the house of Dandelion  
 "aforesaid, the said Margaret Stewart asked  
 "him where his master and Mrs. Halford had  
 "been, to which he replied that they had  
 "been out sitting in the hayfield amongst the  
 "workmen, or to that very effect. That she,  
 "the said Margaret Stewart, did not express  
 "her concern at what he so told her, or make  
 "any reply or observation whatever thereon."

1818.  
*Michaelmas*  
*Term.*  
 ~~~~~  
 HALFORD
 v.
 HALFORD.

The first objection to the admission of this, is,
 that the part objected to is no evidence, and can-
 not be received. The tenth article of the libel
 pleads familiarities; Margaret Stewart deposes at
 great length to a variety of them; and, at the conclu-
 sion of her evidence, says, that Thomas Birch told
 her of the transaction in the hayfield. This then is

1818.
Michaelmas
Term.



HALFORD

v.

HALFORD.

mere hearsay, nothing more ;—it is no evidence of any fact ;—no fact has been pleaded ;—the evidence of Birch could not be received to prove it ;—it is quite unnecessary to contradict this fact, because it never can be brought against Mrs. Halford.—But it is said it would affect the credit of the witness ;—but how so ? She says he declared so to her ; he could not now be brought to contradict her. But suppose he could, and that he came forward and told his story as it is stated in the allegation ;—it is not denied that conversation passed between them ;—he might represent it differently ;—but it would be mere witness against witness ; it might weaken the proof, but it could not discredit the witness. In a contradiction of this sort it would be the slightest of all possible evidence ;—it may easily have been misapprehended ;—it is not that which could affect her credit ;—he might have exaggerated, or she not have understood him ;—or have put too strong an interpretation on what he said.

It is very different from a case where specific interrogatories are put to a witness, and he is asked whether he did or did not declare so and so. There, by bringing two or three persons who were present to disprove what he said, you might materially affect his credit.

The same observations apply to each of the articles of this allegation ;—they are all of the same sort ;—and the Court is the less disposed to admit them, because Mrs. Stewart has been examined to the length of filling with her evidence forty sides of paper ;—there will be opportunity enough of comparing her evidence with itself, and with the evi-

dence of other witnesses ;—her credit must stand or fall by other considerations much more important than that of persons recollecting or not recollecting the conversation she states.—The persons vouched are already examined in the cause ;—their evidence will be contrasted with that of Mrs. Stewart ;—and if they represent the facts differently from her statement, they will afford an opportunity of trying her credit. Besides, the cause is never concluded against the judge ;—and at the hearing he may admit an allegation or exception, if he shall think it necessary.

It would be irregular and unseemly to allow a cause to be delayed by contradictions of mere hearsay ; and, in one instance, the hearsay of hearsay.

I shall reject this allegation.

1818.
Michaelmas
Term.
~
HALFORD
v.
HALFORD.

PREROGATIVE COURT OF CANTERBURY.

1818.
Michaelmas
Term,
Dec. 9.

MUSTO v. SUTCLIFFE.

Probate
granted of
unfinished in-
structions.

JUDGMENT.

Sir JOHN NICHOLL.

In this case Mr. Sutcliffe died before his will could be prepared ;—the instructions are set up ;—they are in these terms :—

“ To give (*a*) to Mrs. Sutcliffe all his pro-
“ perty for life ; and after her death, to give
“ one thousand five hundred pounds to be di-
“ vided equally between the children of my
“ late brother Thomas Sutcliffe, of Bolton-le-
“ Moor, Yorkshire ; and one thousand five
“ hundred equally between the children of
“ my late sister Hannah, the wife of Charles
“ Musto, of Shenfield, in the county of Essex.
“ To give, bequeath, and demise, unto my
“ wife Jane Sutcliffe all my right, title, and

(*a*) There were several erasures and interlineations in these instructions : the words “ five hundred ” in both instances were interlined.

" interest in that, my freehold messuage or
 " tenement in which I now live, situate on the
 " north side of New Street, Henley-upon-
 " Thames, in the county of Oxford ; and to
 " her heirs and assigns for ever ; with the ap-
 " purtenances thereto belonging."

1818.
Michaelmas
Term.
 ~~~~~  
 MUSTO  
 v.  
 SUTCLIFFE.

It is sufficiently proved that the person who received these instructions was satisfied with the intention of the deceased ; and used all reasonable diligence, but could not complete them before the deceased died ;—this would not invalidate the instrument ;—it would have the same effect as if it had been completed, provided the Court be satisfied that volition went with the act,—and that there was sufficient capacity.

The case turns on the proof of the intention at the time.—In all testamentary acts in the last stage of life, the Court looks with vigilance and jealousy to the evidence by which they are supported. On the evidence of the drawer alone there is considerable doubt as to volition. No more is proved than uniform assent on the part of the deceased to the questions put to him ;—he says nothing of himself ;—he answers " yes" to every thing.—While this person was writing down the instructions, Mrs. Wigglesworth, a female friend who was present, asked the deceased several questions to which he did not attend till he heard her ask " Do you know that gentleman ?" —The deceased then distinctly answered, " Yes," as he had also in like manner (the witness adds) answered very distinctly all the former questions that had been put to him.

1818.  
*Michaelmas*  
*Term.*

*Musto*  
*v.*  
*SUTCLIFFE.*

If the case rested here, and there was no other fact, and the question lay between these instructions and an intestacy, the Court would have great difficulty in pronouncing that the disposition of the law was altered :—there is nothing beyond mere acquiescence.

But in this case other circumstances release me from that difficulty ; and raise strong presumptions, and high probabilities, of a testamentary intention and capacity.

The deceased, when a widower, and aged about fifty-five married Mrs. Osborn who was about thirty or thirty-one years of age ;—afterwards he executed a will by which he cut off his wife with a shilling :—this was evidently a will of resentment, and made under an impression of unfounded jealousy ;—this will was deposited with Mr. Charles Musto who lived in the county of Essex.—In 1804 the deceased went to reside at Henley-on-Thames, where he lived till his death on most affectionate terms with his wife ; this is proved not merely by casual observers ; but by those who were extremely intimate with them, and who have established, to my satisfaction, that they were “ a particularly happy couple.”

These are strong presumptions that he did not intend to abide by the will he had made thirteen years ago ;—his declarations are to the same effect :—he builds a summer-house at considerable expense ; declares it is for her, and hopes she would long live to enjoy it.—During an illness he had a year before his death he said, “ I want Nancy to write to my friends in

Essex, that I may alter my affairs, and leave them more comfortable for her." "Nancy, you will go with me to town in October; and then we will alter that will of mine." His wife was unable to attend him at that time, and the visit was postponed till the following spring.—In October he went as usual to London to receive his dividends, and then returned to Henley, bringing his wife presents from London.

These circumstances satisfy me that he fully intended to make a new will, and provide for his wife;—this is a foundation and groundwork for instructions; it is more favourable than an insulated transaction; there are also some favourable circumstances respecting the deceased's capacity. He had been ill only a few days:—he was not exhausted by a long and painful disorder;—at the time of giving the instructions he sat up on the side of his bed wrapped up in a flannel gown with his feet on bottles of hot water (as the witness understood) apparently very ill, but not so ill as to induce the person who took the instructions to think him in immediate danger;—he used few words, but the effect of this is taken off by the consideration of his being one of a religious persuasion (a Quaker) the members of which use few words; and from the nature of his disorder, which was a cough accompanied by depression and lowness of spirits, it is not extraordinary that he should use as few words as possible;—it does not appear that his wife was at all importunate; and it is something to the advantage of that proposition that the suggestion did not originate with her, but with Mrs. Wigglesworth.

1818.  
*Michaelmas*  
*Term.*  
Musto,  
v.  
SUTCLIFFE.

1818.  
Michaelmas  
Term.

Musto  
v.  
Sutcliffe.

The persons who were present are very respectable persons ;—there is no appearance of a conspiracy ;—the account they give presents no inconsistencies or incongruities during the transaction :—when he was told that some lady had come to see him, he said “ it is very kind in her ; ”—he hears, understands, and gives rational answers, before the commencement of the transaction ;—he seems to know Mr. Chapman immediately on his entrance :—after the instructions were taken, and while Mr. Chapman was reducing them into writing, Mrs. Wigglesworth, in order to satisfy herself as to his understanding, asked him if he knew Mr. Chapman. “ Yes sure, child,” was his reply.

Exercising therefore all caution and vigilance in examining a transaction of this kind, I am bound to pronounce for the paper.

As to the 500*l.* additional to the 1000*l.* to the children of Thomas Sutcliffe and of Hannah Musto, it was taken down in the presence of the deceased by the directions of the widow though without any immediate reference to the deceased :—it is adverse to her interest alone ;—she, by propounding the paper, has assented to it ; and, therefore, it must be taken as part of it.

This is a very fit case for the expenses to be paid out of the estate : indeed, it was quite necessary that the case should be brought before the Court.

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1818.  
*Michaelmas*  
*Term,*  
*December 5.*

LEWIS v. LEWIS.

## JUDGMENT.

SIR JOHN NICHOLL.

This is a case of some novelty, and perhaps of some nicety ; and there is every reason why the Court should decline to decide it on the admission of the allegation.

Instructions  
 for a codicil,  
 given to a  
 third person,  
 who was to  
 transmit them  
 to a solicitor,  
 admitted to  
 probate.

The allegation pleads,—

*First*, That Elizabeth Williams died on the 16th of May last, having made her will, dated on the 14th of April, 1818 ; in which she constituted her nephew Griffith George Lewis, Esq. and William Stace, Esq. executors.

*Secondly*, That Griffith Williams, the father of Elizabeth Williams, the testatrix, by his will, dated Feb. 2, 1790 ; amongst other legacies, bequeathed certain monies in the public funds to his three daughters, one of whom was the deceased in this cause in the following words :—“ And as to my  
 “ said money in any of the public funds, I give  
 “ and bequeath the same to my friend Stephen  
 “ Remnant, jun., Esq. his executors, administrators,  
 “ and assigns, upon trust to pay the interest and  
 “ dividends thereof to and among my said three  
 “ daughters, Elizabeth Williams, Ann Williams,  
 “ and Jane Lewis, during their lives, for their sole  
 “ and separate use, and independent of any pre-  
 “ sent or future husband ; and in case of the death  
 “ of any of my said daughters, then in trust for

1818.  
Michaelmas  
Term.

LEWIS  
v.  
LEWIS.

“ the said Stephen Remnant, his executors, administrators, and assigns, to pay and transfer the third part or share of such daughter so dying, to such person or persons as she shall by will give and bequeath the same : but it is my will and desire that my said daughters, or either of them, should not be at liberty to dispose of their share of the principal of such money during their lives.”

*Thirdly,* That Anne Williams, one of the sisters, died in February last, having made her will, by which she bequeathed the whole of her property to Elizabeth Williams, but made no specified disposition of her share of the money in the public funds to which she was entitled by the will of Griffith Williams; and that the said Elizabeth Williams gave instructions to her solicitor, William Preston Morgan, to prepare her will for her, and that he accordingly did so; and when she gave such instructions, she expressed herself as desirous of bequeathing her share of the money in the public funds, to which she was entitled by the will of Griffith Williams, as well as the share of her deceased sister, among her three nieces, Elizabeth Anne Tortoiseshell Lewis, Jane Pitcarn Jones, and Anne Georgiana Martha Lewis; and she accordingly mentioned to William Preston Morgan that those two shares of herself and his sister comprised all the money she was possessed of or entitled to in the public funds. That William Preston Morgan thereupon requested to see the will of her father: but she declined shewing the same, and said



it was unnecessary, as she had the complete disposal of the property."

*Fourthly*, " That immediately after Elizabeth

Williams had executed her will on the 14th of April, 1818, it was by her desire sealed up in an envelope by William Preston Morgan, who delivered the same to her ; and that some time afterwards doubts having been expressed whether the share of Anne Williams deceased in the said stock would pass by her will, and the same having been communicated to Elizabeth Williams, the testatrix, she was much troubled thereat ; and for some time before, and particularly during the last eight or ten days before her decease, expressed great uneasiness lest her own will might occasion any difficulty, saying, that ' she wished Mr. Morgan would call, that he might make any addition or alterations that were necessary in her said will, to prevent the possibility of any question arising upon it as to the disposition of her part or share, as well as the share bequeathed to her by her sister. That the deceased frequently made such declaration to Griffith George Lewis, and other of her friends who were then in the house with her ; and several times desired the said Griffith George Lewis to send for William Preston Morgan, but he deferred sending for him until a correspondence which had taken place between him and his solicitor, as to the effect of the bequest contained in the will of the said Anne Williams, of her share of the money in the public funds, was concluded.

These circumstances in the four first articles leave little or no room to doubt that it was the in-

1818.  
*Michaelmas*  
*Term.*

LEWIS  
v,  
LEWIS.

1818.  
*Michas Williams*  
*Term.*  
 ~~~~~  
 LEWIS
 v.
 LEWIS.

tention of the deceased to give her property in the funds to her nieces. The question then is whether, from the facts stated in the subsequent article, she has done sufficient to remove the doubts she entertained as to the sufficiency of her will;—the paper was not produced to her, nor even read over to her.

The *fifth* article pleads that on the 14th of May, Elizabeth Williams desired her nephew Griffith George Lewis, who was then in her bedroom, to take her will out of a drawer in the said bedroom, and “to send for William Preston Morgan, and deliver it to him, and desire him to make what addition thereto he might think necessary for the purpose of preventing any question or litigation arising respecting her said monies in the public funds;” and that the next morning, finding the deceased very unwell, he went to the house of William Preston Morgan, and delivered him the message, and desired him to call on the deceased.

On the following day Morgan called; the deceased was asleep,—but the will was delivered to him by her nephew;—in consequence of his directions, a codicil was prepared. Morgan carried it for execution;—the deceased was in a stupor, and died on the following morning without any act of execution.

There have been many cases in which instructions received from the party deceased, but not reduced into writing in his presence, nor read over to him, have been pronounced for on clear proof of the intention:—but I believe in all these cases the instructions have been given to the drawer by the

deceased,;—here they were not given by the deceased, but by him to a third person, that however a credible person, and one whose interest it was to maintain an opposite opinion, for he would be entitled himself to a share of that residue which purports to be given by the paper in question to the three nieces; the evidence, therefore, will come recommended by the circumstance of its being adverse to his own interest.

If the deceased had merely told Morgan to prepare such an instrument as would carry her intentions into effect, there can be no doubt but that the case would come under several decisions of this Court.

The question then is whether there is any rule of law that instructions which pass through the medium of a third person should not be admitted to probate, though no question arises on the credit due to the witness, or of the intention of the deceased. The Court undoubtedly, in such a case, would be doubly on its guard: but I have yet to learn that it is essentially and absolutely necessary that the instructions should come from the testator to the person who is to prepare the instrument. Here the instructions are recommended also by the additional consideration that the codicil was not to alter the will, but was supplementary to it, and explanatory of it, and with the express object of removing doubts that might be technically raised as to forms. If all these circumstances can be proved, I shall *on principle* be rather at a loss to know what further demands the law can make in order to induce the

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Michaelmas
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Court to pronounce against the validity of this instrument.

LEWIS
v.
LEWIS.

Allegation admitted.

1819.
Hilary
Term,
February 1.

JUDGMENT.

Sir JOHN NICHOLL.

When the allegation in this case was admitted, the Court expressed an opinion, that if the facts should be proved, the codicil would be valid. I have since revised the arguments and my opinion, and I see no reason to alter the latter. The only question is, whether the facts are so proved as to establish the truth of the allegation. The cases adverted to are those in which doubt was entertained as to facts, but not as to principle; cases in which the Court could not safely rely on the memory of the person who was examined.

If the instructions were given by the deceased, and those instructions were reduced into writing during his lifetime, and sudden death intervened to prevent the due execution of the will, I know of no rule of law to exclude those instructions from probate, because they were reduced into writing by a third person. I see, therefore, no ground to alter my opinion.

On the facts, there is no doubt but that the deceased intended to leave her property in the funds to her neices. The only reason which rendered the codicil necessary was, whether the words of the will would give effect to this intention. The nature of the doubts were well known to the de-

ceased, and clearly expressed by her: she discussed them with her solicitor, Mr. Morgan. All she had to do was to make a codicil to remove doubts as to the construction of her will, there being none as to her intention.

The question is, whether she gave instructions for the preparation of such a codicil? The executor in this case gives evidence against his interest; for if the property should not pass by the will, he would be a party in the distribution of it:—there is every reason to receive his evidence with perfect reliance:—his examination on the fifth article shews that he had in effect received instructions and directions for preparing the codicil.—The manner in which this was to be done he alone could decide.—This is as perfect a direction as if she herself had dictated the words. This I consider as full proof of instructions;—but it does not rest here. A young lady was present who heard this, and confirms it. The Court is extremely jealous where the drawer does receive the instructions himself, lest he should mistake or contravene the meaning of them. Here there is no difficulty of that sort. Her anxiety is clear, and there is no appearance of contrivance. Mr. Lewis directs the solicitor to come there; on his arrival, the testatrix is not in a state to see him, she having fallen into a doze. The whole conduct of the party shews that the instructions were thought to have been finally given;—they were written fair at the bottom of the will itself, under circumstances in which it was proper and regular so to do. The deceased herself considered that she had given final instruc-

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tions;—she was anxious that Mr. Morgan should bring the instrument for her signature, being afraid that she should be too late to sign it at all. Where an instrument is not read over to the deceased, the Court is vigilant for fear of mistake or imposition. Here there was no neglect, and there could be no imposition. The solicitor attended to have it read over, and executed: but was prevented from seeing the deceased on account of her incapacity.

It is most clearly and satisfactorily proved that the deceased gave the instructions, and that the codicil was reduced into writing during her life. It is as valid, therefore, as if it had been absolutely executed by her, and I pronounce for it.

Hilary
Term,
February 8.

GRANT v. LESLIE.

An executor according to the tenor, entitled to be joined in the probate with the surviving executor of a wife.

JUDGMENT.

SIR JOHN NICHOLL.

Lord Newark, the deceased in this case leaves four codicils; by the last he appoints his nephew residuary legatee. His personal property amounted to 37,000*l.*; the legacies to 1400*l.* Charles Grant and Alexander Thompson, two of the executors, took probate, and possessed themselves of the property: but Alex-

ander Thompson is since dead. Mr. Leslie claims now to be executor according to the tenor. The question is, whether he is entitled to be joined in the probate, with an executor expressly appointed.

It has been hardly denied in argument, that if it was the clear intention of the deceased to appoint an executor according to the tenor, it is within the competency of the Court to grant probate to him. The distinction attempted is not founded on solid principle. Why is any person allowed to be an executor according to the tenor? Because it is the intention of the testator that he shall take the management of his property after his death. Undoubtedly, where there is an express appointment of an executor, it is less probable that there should be an indirect appointment to the same office. Still, if the thing is clear, if a testator by codicil should say, "I direct A. B. to join in collecting my property, and paying my legacies," it can scarcely be denied that a person so distinctly appointed must be considered as an executor. The authority from Wentworth (a) is clearly to this effect.

I have caused inquiry to be made at the office and I find there is no rule of practice which should exclude a person so appointed.

In *Collard v. Smith*, (b) I see from my note that the Court said, "this will is so worded that it is hardly possible to understand it. Three persons are named in trust; the question is whether the son is to join with them; the best way

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v.
LESLIE.

(a) *Wentworth's Executor*, Pa. IV. s. 4. p. 230.

(b) *Prerog.* 1799.

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is to join him with the other three ;” and I take it in this case the Court granted probate to an executor not named, together with three that were named.

In *Powell v. Stratford*, (b) the wife was expressly named as executrix. Lord Henniker was to assist her: but he was not called an executor; the Court said he might be so according to the tenor.

Hence, I think, that if the deceased intended to join this person in the management, the Court is to join him in the probate.

The second point is, whether Mr. Leslie is an executor in the terms of this codicil according to the tenor.

The codicil is dated on the 25th of March, 1818. Mr. Leslie was then on the point of attaining twenty-one years of age. The words are, “I appoint my nephew Shirley Conyers Leslie my residuary legatee to discharge all lawful demands against my will and codicils signed of different dates.”

It is a separate codicil;—no other person is the object of it. It is alleged in the act of Court that this is a re-appointment of a residuary legatee: but it is not so. He was appointed residuary legatee when a minor by the will. The words “residuary legatee” are only descriptive. The remaining words express the real object of the codicil, “I appoint my nephew to discharge all lawful demands.” To discharge lawful demands is the

(b) *Prerog.* 1803.

very office of an executor, more especially to pay debts.

Supposing it doubtful, what were the intentions of the deceased;—where the expressions apply to the residuary legatee, the Court must willingly admit him, because he has the greatest interest in the proper management of the estate. Assuming the meaning to be doubtful, I cannot accede to the argument that the Court is not to take into its consideration the convenience and advantage which will be derived to the estate. I have heard no inconvenience stated in case he should be joined to Mr. Grant. I must presume Mr. Grant will do what he says he will do; namely, proceed against the representatives of the other executor, who has died. Suppose he should alter his mind, then there would be great disadvantage to the residuary legatee: but if the residuary legatee is joined with him, then *he* can take care to proceed against Mr. Thompson's estate. There is no inconvenience one way, there is the other way. I shall do what my predecessor did in a similar case. I feel myself authorized to grant a joint probate. I think it was the intention of the deceased that Mr. Leslie should be joined in the executorship: but if this is doubtful, I think there is good reason for granting a joint probate; and I shall grant it.

On the question of costs.

Per Curiam.

I think that the expenses of both sides must be paid out of the estate.

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Term.*

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v.
LESLIE.

ARCHES COURT OF CANTERBURY.

AUSTEN v. DUGGER.

*Easter
Term,
May 8.*

An Appeal from the Consistory Court of Exeter.

Brawling
proved.

JUDGMENT.

SIR JOHN NICHOLL.

The cause comes for hearing on the same evidence as in the Court below : but the counsel on both sides have very properly agreed to omit the evidence on the exceptive plea.

The only question at issue is, whether the defendant is guilty of an offence against the statute of Edward VI. (a) The object of that statute was not to protect private individuals from personal offence : but to protect the church and churchyards from profanation, and to preserve order and decency in the meetings which may be held within them. If an offence has been committed against this statute, and it shall be duly proved, it is the duty of the Court to punish the offender.

(a) 5 & 6 Edw. VI. c. 4.

An objection has been taken to the form of proceedings, and the heading of the articles,—not to the citation itself: but the citation may lead to the interpretation of the articles. The judge cites the party to appear “before us, or our lawful surrogate,” stating the charge, and the promoter. The articles are in the name of the official principal, and in the usual style of the person filling the judicial situation. “We, Ralph Barnes Clerk, Master of Arts, official principal of the Episcopal Consistorial Court of Exeter, our lawful surrogate, *or any other competent judge in this behalf*, do object article and administer to you, Richard Dugger, of the parish of Fowey, in the county of Cornwall, and within our diocese of Exeter aforesaid, Cooper, all and singular the articles and charges following,” &c.

The objection taken is to the expression “*any other competent judge*,” which is said to make the whole matter so undecided before whom he is to appear, that it renders the whole proceeding null and void.

Undoubtedly, in criminal proceedings forms are to be strictly observed: but they must be forms connected with material points. How could this mislead the party? No other competent judge could be capable; it must be the person filling the judicial situation in the Consistory Court of Exeter, or the Court of Appeal. At most they would be only words of surplusage: but I do not think they are to be considered as such. The words appear to me to have been introduced with great propriety;—supposing Mr. Barnes, the official principal, had died

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pending this suit, then his successor would become a competent judge,—the suit would then not have abated by the death of the judge. So in the appeal, the Dean of the Arches must be considered as a competent judge. Although every protection is to be afforded to a person criminally accused;—yet frivolous objections in point of form are not to be allowed. It would be very injurious to the public interest, if they were allowed to defeat a case of this description.—The objection may certainly be taken in this the latest stage of the cause: but that makes it the more incumbent on me to see that the objection is valid. I am clearly of opinion that the objection will not avail the respondent.

The offence laid is, that on the 27th of April, the church rate being produced, Austen, a *principal payer*, in a *peaceable manner* asked Dugger *whether a house of his did not let for 50l. a year, when the said Dugger, unmindful of his soul's health, and regardless of the sacredness of the place, in a loud and quarrelsome voice addressing himself to Austen, exclaimed, "It is a damned lie. I do not say you are a liar: but it is a damned lie."*

It has been contended that these words, if proved, are not an offence against the statute;—that they are neither quarrelling, chiding, nor brawling. As I have already observed, the object of the statute is not to protect the individual, but the sacredness of the place. I am at a loss to know what words can be more improper. They may be so softened as not to impute a lie to Mr. Austen:—but if they are not offensive to Austen, they would be to some other person who had asserted the thing;—they

are words of chiding, quarrelling, and brawling. I am clearly of opinion that they are rightly charged; and that if proved, they constitute the offence which it was the object of the statute to repress.

The next question is, whether they are proved;—two witnesses depose directly to them, the vicar, and one of the churchwardens of the parish. If these witnesses are to be believed, they fully bring the charge within the statute;—their official situation entitles them to credit;—long interrogatories have been addressed to them;—they go into irrelevant matter not properly introduced. I shall no further notice them than to say that they furnish no proof that the witnesses speak untruly.

But the defendant has undertaken to disprove the charge, and to recriminate;—it is an admitted fact, that the vestry was duly held for the election of the churchwardens. Fowey had unfortunately been involved in political contests;—before the arrival of the minister, Mr. Brown and his friends had voted the vestry dissolved, and quitted the church. The minister afterwards arrived; and he and those who remained, considered the vestry as still subsisting, and proceeded to examine the rate. In the course of that examination, the offence charged is stated to have taken place. Dugger protested against the rate on the ground that the vestry was adjourned, and entered his protest. Brown and his friends returning, an altercation ensues, and there is almost a scuffle.

Whether the rate was properly or improperly made;—whether the adjournment was regular or not;—whether the protest was valid or not, or

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which party was to blame, do no bear upon the question. The Court has no further remark, than to express regret that conduct of this kind should have taken place where decency and order were so peculiarly necessary.

The only remaining question is whether the charge is *disproved*? The defendant himself states that there was a dispute, and undertakes to prove that the quarrelling was on the part of Austen, and yet not one witness attempts to shew that Austen acted improperly.

The answers of Austen have been taken,—he is represented as a respectable person,—the words laid in the articles are addressed to him; he must have been able to answer upon oath, whether the words were used or not. Without resorting to the right the Court has of reading the answers, I must presume, as they have not been read by the adverse party, that they contain a denial of what the defendant has alleged.

The Court, however, does not rely on this: but the witnesses state they did not hear the words;—this is a mere negative, which would not be very stringent against positive witnesses. On examining their evidence, I am by no means certain that either of them satisfactorily proves himself to have been present at the time the words are deposed to have been spoken. On the whole, I am of opinion that it amounts not to a contradiction of the two witnesses who speak affirmatively in support of the articles. All may be true which is deposed to on both sides.

I am conscientiously satisfied that the defendant

has been guilty of the offence, and is liable to be convicted under the statute, which it is the duty of the Court to enforce, not only in obedience to the law, but because it is as necessary now as when the law was made to prevent the profanation of sacred places, and to repress such conduct at meetings where party and passion ought to find no place.

I reverse the sentence, pronounce the party to have been guilty of brawling, suspend him *ab ingressu ecclesiæ* for one week, which is sufficient to mark the sense I entertain of the case. In respect to costs, the complainant is entitled to them generally: but I am disposed in this instance to disallow those occasioned by the exceptive plea. With this exception, I condemn the defendant in costs in both courts.

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PREROGATIVE COURT OF CANTERBURY.

1819.
Hilary
Term,
Feb. 13, 17.

When a will
is not found
on the death
of a testator
the presump-
tion of law is
that it has
been destroy-
ed by him.

LOXLEY v. JACKSON.

JUDGMENT.

Sir JOHN NICHOLL.

The deceased made a will in 1809, and left every thing to Mr. Jackson except two small legacies;—he was the sole executor; the will was deposited in his hands where it remained till after the death of the testator.—Another will is stated to have been made on the 28th of December, 1816, giving considerable part of the property to Mr. Loxley's family, who were next of kin. Mr. Jackson is residuary legatee and one of the executors. This latter will was in the custody of the deceased, but is not produced;—a draft of it is propounded.

The question is whether it is proved by Loxley that the will was not destroyed by the testatrix or that it has been destroyed since her death.—The presumption of law is, that she herself destroyed it *animo revocandi*;—the law does not presume fraud;—the burthen of proof is on Mr. Loxley; he has charged Mr. Jackson with the

spoliation of the will ;—and the question is, whether it has been destroyed or suppressed without the privity of the testatrix.

Sarah Thompson is the deceased ;—the parties are her nephews and nieces ;—the property amounted to 4,000*l.* ;—the husband was an engraver ;—she took into partnership Mr. Jackson, who had been first an apprentice, and afterwards foreman. In 1808 Jackson married the daughter of her first husband ;—in June, 1809, the first will was made ;—there was no mention of this daughter in the first will ; but it contained expressions of the greatest regard and fullest confidence in Mr. Jackson. Mrs. Thompson retires from business ; and in 1813, Mrs. Jackson dies without issue ;—no alteration in consequence of that event is made in the will of 1809 ; it remains in full force till 1816. —In 1816 the deceased entertained a suspicion that Mr. Jackson had formed an illicit connection with a maid servant ; in consequence of this he was lowered in her regard ; but she does not, therefore, give him up ;—she selects him to accompany her to Harrogate in the autumn ;—it is suggested that about this time the deceased wrote a testamentary paper ; but this is founded on such loose circumstances that it appears to be mere conjecture. —She does however, secretly and without the privity of Jackson, procure Watts to make a new will for her towards the end of the year ;—she signs the draft of it in November, and on the 8th of December executes the will :—these facts are clearly ascertained ;—it is unnecessary to advert to the depositions ;—the instrument was left in the possession

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Term.*LOXLEY
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of the deceased, and deposited in a blue box :—box was deposited in the closet of her room, and remained in that closet till after her death.

The questions are, whether the deceased is proved negatively to have been unable to destroy the herself, or whether Jackson had access to it during her lifetime, or had possession of it after her death.—The principal witness is Elizabeth Washington who has released her legacy under the will ;—has been examined by both sides ;—her impression is that it was in the blue box at the deceased's death.—It is necessary to examine the grounds of this opinion ;—she went to live with the deceased on the 3d of January, 1815, and continued her servant till her death ; she states on her examination “ that on the evening after Mr. Watts had left the deceased, she told the deponent that she had been making her will ; and that to prevent mistake and that the deponent might not have any trouble in getting it, she had left her 30*l.* ; and she is sure that Mr. Jackson would see it righted ; and that at the time she told her of 30*l.* she enjoined the deponent, the moment her breath was out of her body, to take the will to Mr. Watts, and deliver it to him ; that on the same evening, seeing the will lying upon the top of a chest of drawers wrapped up, and fastened in cover with three seals, she asked her mistress if it should not be put away, who then desired the deponent to put it into a drawer of the chest of drawers ; that after it had remained there about a week she asked her mistress if it had better be put in some more secure place ;—

she desired her to bring a small box covered with blue leather in which she always kept some papers; that the box stood on a shelf in the cupboard in the deceased's bed-chamber, in which at that time she chiefly staid; that after she had fetched the box the deceased desired her to get the key (which was in a little drawer) and open it, which she did, and put the will into it, locked it again, and put the key into the little drawer; and then, by her mistress's desire, put the box again into its place in the cupboard;—that whilst the deceased kept in her bed-room such cupboard was seldom locked; but when she did not keep her bed-room it was generally locked, and either the deceased or the deponent then had the key;—when she replaced the box, she put on the top of it five small pictures, wrapped up in a newspaper, and a pair of silver branches that belonged to some candlesticks also rested on it; and the said blue box never, to her knowledge, was afterwards moved after so replaced by her as before deposed, during the deceased's lifetime; and after her death the deponent saw the newspaper parcel with the five pictures, and the silver branches, resting and lying on the said box apparently in the precise position in which she had before placed them. Wherefore she does verily believe that the said will was therein at the time the deceased died; for if the deceased had taken it out, she thinks she must have known it, as no person but her mistress and herself ever went to that cupboard.—That in the course of the last week of the deceased's life she asked her if she

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should write to any of the family of Mr. Loxley ; and the deceased said, " No ;"—that on the day after the deceased's death Mr. Jackson asked the deponent for the key of the cupboard, in the deceased's bedchamber, wherein the blue box was, and the deponent unlocked the cupboard in his presence, Mr. Jackson removed the pictures and silver branches, and then took out the blue box in which the deponent believes the will of the deceased, made by Mr. Watts, then was ;—she then told him that the will was in the box, and that the deceased had directed her to take it to Mr. Watts the moment the breath was out of her body ; and that she was desirous of performing her mistress's request, and told Mr. Jackson so, who said, ' What have I to do with Mr. Watts ? I shall employ the person who used to do business for your mistress ; ' and Mr. Jackson delivered the blue box together with a tin box, a red trunk, and a writing desk belonging to the deceased, to a Mr. Downe, who took them all away with him in a hackney coach."

In answer to an interrogatory this witness says, " The deceased could no doubt have had access to the box in which the will of December was deposited, but had not to the respondent's knowledge ;—that the blue box was locked when removed by Mr. Downe ; that the key was in the drawer of the deceased's dressing table at that time."

Thus stand the facts on this evidence.

The first point is the inability of the deceased to destroy the will. Washingham has a strong impression that the will remained in the blue box : but she does not suggest that the deceased, after the

28th of December, made any reference to it as a will in existence ;—the injunction to carry it to Watts is not renewed :—there is no recognition either directly or indirectly of its being in existence. On the other hand the deceased lived for nearly three months with the will in the closet to which she had access without the knowledge of any person ;—is there any probability that she should have secretly destroyed the will ? If she wished to destroy it, she would naturally replace the things in the state they were before.—As to her bodily incapacity, when I find that, within a fortnight of her death, she is able to go from Kennington to the Bank, and other places, it would require more satisfactory evidence than Washingham's to convince me of it.—Add to this :—Mr. Spencer's evidence renders it not improbable that she should have destroyed the will. He says, “ that the deceased frequently expressed great uneasiness to him at the conduct of Walter Jackson who had formed an illicit intercourse with his female servant, and expressed her fear lest he should marry her : but that in January, 1817, Walter Jackson requested the deponent, as a friend, to go to Burnham and discharge his servant Mary, the person of whom the deceased had complained, but did not explain his motives for so doing. The deponent discharged the servant ; and a short time afterwards, that is, the end of January or beginning of February, 1817, being with the deceased who was then ill, she was regretting to him not being able to go to see her son (as she always called Walter Jackson) and on the deponent's asking her why, she said on ac-

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count of that woman who is there of whom I have often spoken to you. I cannot go whilst she is there. The deponent told her that all her objections on that head were removed ; for that she, meaning the aforesaid Mary, had left the house long before ; and the deceased expressed the greatest pleasure and satisfaction at that event, and told the deponent he had made her quite happy by the communication.

Other witnesses, not less than seven, speak to the communication made by Spencer of the removal of the female servant. Some place it earlier than this will ;—three of them differ as to time ;—where they differ as to time the Court cannot rely on their fixing it, as they assign no particular reason for fixing it at any time. It is said this period is so important that Jackson should have been able to fix it with certainty ;—but he had no reason to expect contrariety of evidence, and Loxley did not counterplead the fact ;—but taking the fact the other way that the communication was previous to the will, still being satisfied that Jackson had discharged the woman, it is not inconsistent with the ordinary movements of the human mind that she might have reverted to her original regard for him.

Spencer had several interviews with the deceased in March : he speaks to the warmth of her feeling, and to the relief of her mind at learning that Jackson had broken off the connection with the servant. She told him “ she could not rest in her bed, or be easy in her bed, till she had done something. He believes these were her very words : she did not say

she had destroyed a will, or some other act prejudicial to Walter Jackson : but she said that things were now as they had been before, and that she was perfectly happy."

These declarations, and her saying that things were as they had been before, coupled with her unwillingness to say any thing of the will, and her attachment to Jackson, make the court think that Spencer is correct in supposing that she continued her confidence to Jackson. He is the only person she wishes to be sent for during her last illness ;—the probability of the fact is strong that the presumption of law draws the right conclusion.

The burthen of proof is on the other party :—is there any evidence that Jackson destroyed the will in the deceased's life time? It is not suggested that he had any access to it at that period, or any knowledge even of its existence.—If the case rested here, and immediately after her death her repositories had been opened, I should have had no difficulty in deciding it.

There is, however, the important fact that Jackson having been told the will was in the blue box, thought proper to remove it ;—his conduct in this respect was imprudent and unguarded, to say the least of it. It is my duty for the interests of justice, and the security of testamentary instruments, to hold that when persons undertake to do this, they subject themselves to strong presumptions against their conduct : but fortunately Mr. Jackson has been able to prove the charge of spoliation unfounded ;—the blue box was placed in Mr. Downe's

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hands; the key was in the hands of Washington.

Mr. Downe has been examined;—he delivered the box to his wife to be locked up. Mrs. Downe proves the receipt of it;—she went to market, and returned home, and found the solicitor and Mr. Jackson.—The solicitor proves it was unlocked in his presence. This forms a complete chain of evidence directly proving that, notwithstanding Washington's impression, the box did not contain the will. From these circumstances added to the consideration that she did not mean to die intestate,—I am satisfied the box did not contain the will at the time of the deceased's death.

The presumption is, that she destroyed it with the intention of reviving her former will; and I direct the probate of that will to be again given out of the registry.

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Hilary
Term,
March 2.

FRISWELL v. MOORE.

JUDGMENT.

SIR JOHN NICHOLL.

Thomas Matthew Field the deceased died in May, 1818; the paper propounded is entirely in his handwriting.

A will without date or signature established.

“ Be it known to those whom it may concern that I, Thomas Matthew Field, now living at No. 93, Wimpole Street, near Oxford Chapel, being of sound mind, and revoking all former wills, being induced by prudential motives and the consideration of the uncertainty of human life to make such a distribution of whatever worldly property that may appertain to me at the time of my decease, as to prevent any litigation concerning the same. With this intent I have annexed a catalogue of my furniture, cloathing and household requisites, which, with my leasehold premises, and property in the public funds, will comprehend nearly the whole of my worldly possessions; and which it is my desire to dispose of in the following manner. *Imprimis*.—I have appointed Mrs. Mary Moore, and Mrs. Dodwell, now living at 40, Doughty-street, Gray’s Inn Lane, to be my executors, to receive and dispose of, in manner hereinafter mentioned, all such rents, interests, and monies, as are now or

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“ may hereafter become due to me. And to
 “ give them as little trouble as possible in the
 “ performance of this friendly office, I have
 “ intrusted Mrs. Friswell, with whom I now
 “ lodge (who is fully acquainted with the sub-
 “ ject) to collect all such rents and interests
 “ and pay all such demands thereon as are or
 “ may become due thereon, rendering a true
 “ account of the same to my before named ex-
 “ ecutors, and paying to them the net produce
 “ to be by them or her placed in the public
 “ funds, called the Old Navy five per cents,
 “ with the stock already there in my name.
 “ The interest of this increasing stock Mrs.
 “ Friswell may be enabled to receive by my
 “ executors granting to her a power of at-
 “ torney so to do ; and allow her twopence in
 “ the pound for her trouble in collecting.
 “ This process I desire may be continued for
 “ seven years after my death, or so long as
 “ Mrs. Friswell shall continue to discharge
 “ this office satisfactorily and faithfully to
 “ my executors ; after which time I desire
 “ the net produce of all my rents and in-
 “ terests may be equally shared as they be-
 “ come due among my four nephews and
 “ nieces (that is to say) William Henry Moore,
 “ Thomas Matthews Moore, Elizabeth Moore,
 “ and Ann Moore, children of my late sister
 “ Martha Moore, or the survivors or survivor
 “ of them during their lives ; and after their
 “ decease the remainder, both principal and
 “ interest, to be divided among such of their

"legitimate children as may respectively attain the age of twenty-one years.

"*Item.*—To Mary Frith, commonly called my niece, and formerly my servant, the sum of 30*l.* a year during her life, and independent of any husband she may contract, and 10*l.* in money.

"*Item.*—To my executors, I leave the sum of 100*l.* each in the 3 per cent. consols.

"*Item.*—To Mrs. Brown 10*l.*

"*Item.*—To Mrs. Davidson 10*l.*

"*Item.*—To Mrs. Holcroft 10*l.*

"In case of the expiration of leases or other casualties, I desire my executors may act therein as they may think best for the benefit of my legatees consulting with them (should they or any of them be in England) on the means to be taken.

"*Item.*—My household furniture, beds, bedding, wearing apparel, utensils requisite, writing desk, and implements, I leave to my servant Sarah Pardoe.

"*Item.*—My books of account, leases, papers, and documents, it may be necessary my executors should have temporary possession of. These of every kind relative to my property or business, my printed books, plate, gold watch, I leave to my executors in trust for Thomas M. Moore.

"My veterinary stock I desire may be disposed of for the benefit of such of my nephews and nieces as may be then living. In case of any lapsed legacy occurring, I

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Hilary

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FRISWELL

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“ desire it may be added to the general stock
“ intended for my nephews and nieces.”

It is written fairly ;—there is nothing to shew that he intended to do any further act ;—at the end of the whole there is an inventory setting forth the state of his property ; but it has neither date nor signature.

The paper is propounded by Mrs. Friswell who is to do all acts for seven years ;—the two executors have renounced probate probably for the purpose of being examined as witnesses in the cause.—The deceased had been formerly a surgeon : he is described as of peculiar and singular habits which account for the *shape* of the will ;—his wife died before him, and he lived afterwards with a family of the name of Friswell, in Wimpole Street ;—he died suddenly at a small inn :—All these circumstances are stated in plea, and proved by seven witnesses. From the evidence I am satisfied that it was the deceased's intention that the will should operate in its present form.

The question now is, who is to have the administration with the will annexed. Mrs. Friswell is to act as substitute ;—if there is no executor, it is said Mrs. Friswell is executor according to the tenor ;—but her claim is resisted by the intervention of one of the nephews who has been resident in New South Wales ;—if this person is come over with competent authority from three other residuary legatees, I do not see how I can refuse the administration to him.

I pronounce for the will ; and decree administra-

tion with the will annexed to Thomas Moore, and direct the sureties to justify.

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Hilary
Term.

FRISWELL

v.

MOORE.

Easter
Term.
May 5.

Application was made to the Court to rescind that part of the decree of the 2d of March last, which called upon the sureties to justify.

Phillimore.

The executors have renounced ;—the right to the administration is in Thomas Moore, who has competent authority from all the other residuary legatees for life, to undertake the administration :—he could find no sureties to justify ;—the demand for them was unusual ; and, on general principle, the introduction of such a practice would be objectionable.—No case could be produced of a residuary legatee being called upon by the Prerogative Court to give justifying security.

Residuary
legatees for
life taking ad-
ministration
with the will
annexed call-
ed upon to
give some se-
curity.

Adams contra.

The reasons stated make it more incumbent on the Court to adhere to the decree ;—the not being able to find sureties increases the danger ;—besides it is objectionable to rescind a decree already made.

Per Curiam.

I should recommend the parties to arrange this point between themselves ; and, with that view, direct the cause to stand over till next Court.

It was stated on behalf of the residuary legatees for life that they were willing to give security in

Trinity
Term,
June 28.

1819.
Trinity
Term.

5,000*l.*, which was four times the amount in value of the legacies bequeathed to them.



Per Curiam.

FRISWELL
v.
MOORE.

The Court will be satisfied with this ;—the only object is the protection of property belonging ultimately to minors. There is no suspicion against the party.

ROCKELL v. YOUNDE.

1819.
Easter
Term,
April 28.

JOHN HINKSMAN died, at Erbistock, in the county of Flint, on the 6th of April, 1818. leaving personal property to the amount of 3,800*l.*—By his will which was formally executed on the 21st of July, 1806, he distributed his property amongst several of his relations and friends, and appointed Ann Rockell, his sister, and Thomas Watkin Youde, executors.

A bequest of residue omitted through the error or inadvertence of the solicitor to be inserted in a testamentary instrument, not admitted to probate.

An allegation was given in on the part of Ann Rockell, which, after stating a variety of circumstances which had induced a change in the testamentary intentions of the deceased with respect to Thomas Youde, who, besides being an executor, was a considerable legatee under the will, proceeded to plead, "That the deceased became indisposed in January, 1818; but that till the afternoon of the day previous to his decease the indisposition was never considered by himself or any of his friends or attendants as immediately dangerous;—that from the time, or very shortly after, he had been attacked by illness he expressed an earnest wish that Mr. Pugh, an intimate friend of his, who resided at Erbistock, but who was then absent at Chester, would return home, as he wished him to draw up a will for him;—but the said Mr. Pugh having broken his leg did not return home during the deceased's lifetime."

1819.

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“ That having a desire to provide more amply for his sister, Ann Rockell, and finding his health fast declining, and that Mr. Pugh did not return, he on the 4th of April last sent to Richard Miller Benjamin, a solicitor, residing at Wrexham, about eight miles distant from Erbistock, to desire him to attend immediately in order to receive instructions for his will;—that Richard Miller Benjamin accordingly waited on the deceased on the evening of the 4th of April, and found him in bed apparently in a very weak state of health, but of perfectly sound mind, memory, and understanding;—that the deceased proceeded to give the said Richard Miller Benjamin instructions for his will;—and one of the first observations the deceased made on giving such instructions, which he several times repeated, was, that it was his intention to leave all his property to his sister, Ann Rockell, except a few legacies, which he then mentioned, and which were committed to writing by the said Richard Miller Benjamin in the deceased’s presence;—*but he the said Richard Miller Benjamin having from the deceased’s particularity respecting his said sister a perfect recollection of the instructions relating to her omitted to put in writing any disposition of the residue of his personal estate directed to be made for the benefit of his aforesaid sister*;—that the instructions, so as aforesaid in part committed to writing, were not signed or otherwise executed by the deceased; nor were they read over either to or by him, whereby he was unable to know that the disposition of the residue in favour of his sister was omitted; and the de-

ceased verily believed that Richard Miller Benjamin had inserted in the instructions such intended disposition of the residue." And it was further alleged "that the deceased having *given full, complete, and final instructions*, to Richard Miller Benjamin for the disposal of his personal estate and effects desired him to prepare a will therefrom, and to have the same immediately engrossed fair for execution, and said he would send for him to attend the execution thereof on the following day, *viz.* the 5th of April; and the deceased, being apprehensive of death, and very anxious to execute his will, again sent to Richard Miller Benjamin, desiring to see him: that not having drawn up the will as desired by the deceased, *Richard Miller Benjamin taking with him the instructions, repaired very early on the following morning to the deceased's house; and then found that the deceased had departed this life some few hours previous to his arrival.*"

The allegation then exhibited the *instructions*, and alleged and propounded the same to be and contain the true and original instructions for the last will and testament of the deceased which were committed to writing in his presence, and at his desire, and propounded the same *together with the bequest of the residue of the personal estate and effects of the deceased* directed by the deceased to be given and bequeathed to his sister, Ann Rockell; *but, through error or inadvertence, omitted to be therein inserted*, as containing together the true and original last will and testament of the deceased."

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Jenner and Phillimore against the admission of the allegations.

Adams and Lushington in support of it.

JUDGMENT.

SIR JOHN NICHOLL.

This is an allegation setting up a case of a very novel sort, and must have been brought before the Court rather to satisfy the wishes of the party than from any hope the counsel could have entertained that it could be attended with success :—to admit it, would be to establish a precedent contrary to all the rules which have governed this Court subsequent to the passing of the Statute of Frauds.

The deceased died on the 6th of April of last year ;—the will was made in 1806. The residue is left to a sister for life, and afterwards to her children. The sister and Mr. Youde are appointed executors ;—the will remained in the possession of the deceased, and is found uncanceled. Between 1806 and his death a new will was begun ;—this unfinished will is very much like the former will ;—whether he would have gone on to appoint the same executors, and make it in other respects the same, the Court cannot decide :—it breaks off in the middle. Two days before his death he sent for his solicitor, and gave him instructions in the manner stated ; but these are merely the heads of legacies which amount to 350*l.* ;—there is no bequest of the residue ;—no appointment of executors ;—it is the mere inception of a disposition ;—an attempt is made to propound this paper with a bequest omitted to be reduced into writing ;—

there is no case that I am aware of in which a bequest has been established that has not been reduced into writing in the lifetime of the testator.—

The Court has gone the greatest possible length when it has pronounced for instructions which have been reduced into writing during the lifetime of the deceased ;—but which have not been read over to him. The Court has always stopped short where the instrument has not been reduced into writing till after the death ; and I cannot agree in the construction attempted to be put on the Statute of Frauds that this would be a will by word of mouth.

The Court is always anxious to carry into effect the intentions of a party ; but it must be when those intentions are shewn in a legal form ;—it cannot act upon conjectures of its own.

Whether this is pleaded in the usual form is immaterial further than to shew that it could not, from the nature of the attempt, be stated in the usual form.—In supply of proof they exhibit B., and then propound that paper together with the bequest of the residue “ *through error and inadvertence omitted to be inserted.*” This is a perfect novelty ;—it would be difficult since the Statute of Frauds to find any pleading of this description.

It is a common rule that a paper in part proceeded upon cannot revoke a former will ; it can only revoke it *pro tanto* even as to a personal estate ;—this paper is not, however, brought before the Court in that way ; and, therefore, I am not called upon so to deal with it.—All that is stated as to the dissatisfaction of the deceased with Mr.

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Yude would be corroborative of his intention to make a new will ;—if a new will had been made, the allegation might in this respect have been admissible ; but these circumstances are not sufficient of themselves to have the effect of a revocation.

What is the proposition? To pronounce for B. with a disposition of the residue not reduced into writing during the lifetime of the deceased. I purposely forbear going into the detail of the circumstances which have been commented upon by the counsel in support of this allegation, because I am unwilling to shake the effect of the rule.

I hold it wise in the law not to open a door to the admission of parole evidence to this extent.— Courts have gone the utmost length to which it would be prudent to go ;—they only go even that length with great caution, when they admit to proof papers reduced into writing during the lifetime of a testator. For the sake of the public, and to protect the interest they have in the disposal of personal property, it is quite right that the Court should firmly adhere to this rule ; and, therefore, I reject this allegation.

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ARCHES COURT OF CANTERBURY.

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NORTON v. SETON, *falsely calling herself* NORTON.

1819.  
Michaelmas  
Term,  
Dec. 4.

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*By letters of request from the Consistory Court  
of Peterborough.*

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**T**HIS was a suit of nullity of marriage instituted by George Norton by reason of his own natural impotency and defect in his organs of generation.—The marriage had been solemnized by licence on the 18th of June, 1812, he being then forty-five and the woman twenty-three years of age.—They had cohabited till June of the present year.

A man not allowed to plead his own natural impotency as a ground for a sentence of nullity of marriage.

*Adams and Dodson in objection to the libel.*

This is a novel suit, and one which cannot be entertained.—A man, after seven years' cohabitation, sues for a nullity of marriage on the ground of a defect in himself which has always existed ;—

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*Term.*  
  
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he is desirous that his wife, having lost all opportunity of settlement, and he having taken all opportunities of fortune accruing to her, should now be dismissed from her marriage.

We find no express law that a man may or may not complain on this ground, probably because no one could contemplate such a case. A woman may complain of the impotency of her husband; and the canon law would hold such a marriage not merely voidable but void. X. 2. 27. 2. 29.—Brower 2. 4. 14. 16. 2. 4. 22. Sanchez 7. 97. 9. 10. 12. 7. 98. But in X. (a) 4. 15. 4. we find that a person is not entitled to a divorce who knowingly contracts marriage with an impotent person;—*à fortiori*, therefore, a person who knows of his own impotency cannot make it the foundation for a suit of nullity of marriage. We submit that the husband is not entitled to bring such a suit; and that if the point be only doubtful, the Court should not hesitate to dismiss the cause.

*Phillimore and Lushington in support of the libel.*

No doctrine of the Canon Law is clearer than that a man may sue for a nullity of marriage by reason of his own impotency. The text law, (b) deduced originally

(a) Consultationi tuæ qua nos consulisti, utrùm fœminæ clausæ impotentes commisceri maribus, matrimonium possint contrahere, et si contraxerint an debeat rescindi? Taliter respondemus, quòd licet incredibile videatur quòd aliquis cum talibus contrahat matrimonium. Romana tamen ecclesia consuevit in consimilibus judicare, ut quæ tanquam uxores habere non possunt habeant ut sorores.

(A) Cod. 5. Nov. 22. 6.

from the civil law, is unequivocal. (c) X. 4. 15. 1. X. 2. 19. 4. All the commentators have interpreted it in the same manner. Panormitan, (d) whom Hostiensis and all the others follow, is so explicit as not to be mistaken. Ayliffe (e) makes it clear that we have imported this doctrine into the Canon Law as administered in this country ;—and a manuscript opinion of the late Sir W. Wynne (f) shews his understand-

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(c) *Accepisti mulierem, et per aliquot tempus habuisti, per mensem, aut per tres, aut per annum : et nunc primum dicisti te esse frigide naturæ, ita ut non potuisses convenire cum illâ, nec cum aliquâ aliâ. Si illa quæ uxor tua esse debuit eadem affirmat quæ tu dicis, et probari potest per verum iudicium ita esse ut dicitis, separari potestis : eâ tamen ratione, ut si tu post aliam acceperis, reus perjurii dijudicaris, et iterum post peractam penitentiam priori connubio reparare debebis.*

(d) *Nota.*—Maritus potest reclamare et petere separationem etiam impedimento proveniente ex se ; interest enim suæ ut separentur ; si non est inter eos verum matrimonium ut non teneantur ad onera matrimonii. Abb. super quarto.—Accepisti, &c. 1.

(e) The husband may pray a separation of matrimony on account of a matrimonial impediment, though such impediment proceeds and arises from himself ; as from his own impotency and frigidity. Parergon. 230.

(f) I think a woman may institute a suit of nullity of marriage against her husband on account of impotency or incapacity *in herself* to perform the duties of marriage ; and I think that if the persons appointed by the Court to inspect her (which is the method of proof upon which these cases always proceed) should certify that she appeared to them, from a defect in the natural formation of her body, to be absolutely incapable of being carnally known by a man ; upon this proof the marriage must be pronounced null and void. WILLIAM WYNNE.

Doctors' Commons,

May 5, 1777.

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ing of our practice to be the same. The ground of the nullity is that the marriage being void, there can have been no contract; all the reasoning, therefore, deduced from the authority of other contracts must fail.—Put the case of a man naturally impotent intermarrying with a woman, and that woman becoming pregnant by another man,—what remedy has he, or which is of more importance, what remedy have those who have a reversionary interest in his property but a suit of this description?—By what other course of proceeding can his estates be prevented from being transferred to foreigners? This is the only remedy pointed out by the law of the land; the suit is to be entertained for the purpose of ascertaining whether there has been *verum matrimonium*, and to ascertain the relative *status* and condition of the parties to each other. It is very true that the books lay down that a man (*f*) is not entitled to a divorce who knowingly contracts marriage with an impotent person: but the very same books lay down that he may allege his own impotency as a ground of divorce.

Per Curiam.

I shall examine the authorities before I give my judgment to see what was the doctrine of the Canon Law, and how far it has been adopted here; and, in the mean time, I wish search to be made whether there has been any precedent for such a

(*g*) But if he knowingly marries a woman that cannot render him his due, he is (notwithstanding) bound to maintain her; and shall not be divorced from her, for he ought to impute it to himself. Parergon §30.

suit. If the defect is such as has been pleaded it seems as if the marriage must have been contracted *scienter*; then, after so long a cohabitation, the party comes to annul his own contract. I wish precedents to be produced, if there be any.

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Phillimore

Stated the difficulties that had attended the search from the want of Reported Cases, and the inaccurate manner in which the Arches books had been kept. The search had been made with a twofold purpose: first, to ascertain the greatest number of years that had elapsed between a marriage and the institution of a suit of this description;—and, 2dly, Whether any instance could be adduced of a person instituting a suit on the allegation of his or her own impotency.

1820.
Hilary
Term,
January 20.

The cases found were the following:

The Honourable Catherine Elizabeth Weld, (*h*) *alias* Aston, *against* Edward Weld, of Lulworth Castle, in Dorsetshire, a cause of nullity of marriage, by reason of impotence, in the Arches *primâ instantiâ* by Letters of Request from the Chancellor of Bristol. (*i*) The parties were married in 1727, the suit was brought in 1730.

(*h*) A daughter of Lord Aston's.

(*i*) This cause was appealed to the Delegates. The first entry of it in the Court, or (as it is technically termed) The Assignment Book of the Delegates on April 27, 1732, is as follows:—

Archibaldus, Comes Ilay; Josephus, permissione divinâ

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The Duchess v. The Duke of Beaufort. Arches
1742. The suit was originally brought in the

Roffensis Episcopus; Thomas, eadem permissione Bangorensis Episcopus; Thomas, eadem permissione Asaphensis Episcopus; Johannes, Dominus Delawarr; Thomas, Dominus Foley; Jacobus Reynolds, Armiger, Cap. Baro Scaccarii S. D. N. R.; Alexander Denton, Armiger, unus Jurisconsultorum S. D. N. R. de Banco; Johannes Comyns, Miles, unus Baronum Scaccarii S. D. N. R.; Dominus Henricus Penrice, Miles; Matt. Tindall; Robertus Wood; Carolus Pinfold; Edwardus Kinaston, LL. D.

Honorabilis Fœmina Catherina Eliza Weld, alias Aston, uxor pretensa Edwardi Weld de Lullworth Castle, in comitatu Dorsetiæ, Armigeri, contra eandem Edwardam Weld.

Greenly exhibuit commissionem appendentem sub magno sigillo Magnæ Britannię.—Domini acceptarunt onus executionis ejusdem ad petitionem dicti Greenly exhibentis procurium pro parte appellante—decreverunt citationem tertio, &c.—et monitionem pro processu transmittendo in primam sessionem proximi termini.—Boycott exhibuit procurium speciale manu propriâ et sigillo Edwardi Weld, Armigeri, partis appellatæ (here follow two words not legible) Domini ad ejus petitionem assignarunt Greenly ad libellandum in proximum.

On February 17, 1732, the following entry occurs in the assignation Book which appears to have been made under the direction of the condelegates;—for the names of none but the civilians in the commission, viz. Sir Henry Penrice, Drs. Tindall, Wood, Pinfold, and Kinaston, are prefixed to the minute. ‘Domini assignaverunt ad infirmandum in jure in diem proximum whether there must be a continual cohabitation *per spatium triennale* without interruption;—whether, after three years’ cohabitation and the woman found a virgin—whether the marriage shall not be declared null and void;—whether a man that has been married three years, and at the end of that time is viewed by surgeons and reported by them to be fully capable of propagation;—whether such marriage can be dissolved;—notice to be given to the Lords Spiritual and Temporal.’

Consistory Court of London where the judge ordered the fourth article of the libel to be reformed;—it was appealed to the Arches, where the libel was admitted in its original form. The cause was finally heard in the Arches, May, 1743, on the Duke's answers, and the inspection of physicians, and decided in favour of the Duke;—the Duke was twenty-one years old at the marriage, the Duchess seventeen;—the marriage took place in 1729.

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Leeds, otherwise Lamborn, *v.* Leeds. Parties married in 1753: the suit was brought by the wife in the Consistory Court of London, in May, 1758. The libel was admitted; and the report of the physicians and surgeons was made on the 25th of May, 1759. The proctor for Mrs. Leeds objected to that report as not being sufficiently full and clear, and prayed a further report. The judge rejected the petition, and concluded the cause;—it (*k*) was appealed to the Arches, where the appeal was pronounced for. The judge ordered a more full report:—a further report was accordingly made; but that also was objected to on the behalf of Mrs. Leeds. (*l*) The cause was appealed to the Dele-

The case was argued on the 21st and 23d; and sentence was given on the 24th of May, 1733, in favour of Mr. Weld;—when the cause was remitted to the Inferior Court. The Judges Delegates present at the hearing and the sentence were the Bishops of Rochester and St. Asaph, Lord Delawarr, Chief Baron Reynolds, Baron Comyns, Sir H. Penrice, Judge of the Admiralty, Drs. Tindall, Pinfold, and Kinaston.

(*k*) The libel pleaded frigidity and impotency.

(*l*) December 14, 1759. In the principal cause an allegation was brought on the part of Mrs. Leeds, to which answers

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gates. The Delegates pronounced against the appeal, but retained the cause; and it does not appear that any further proceedings were had in it.

Forster, *otherwise* Schutz, *v.* Schutz, Consistory of London, 1770. The marriage took place in March 1770. The suit was brought by the wife in November of the same year. The libel was admitted, some irrelevant articles being rejected. A report of physicians and surgeons was made. Objection was taken to that report. The judge pronounced it to be full. The cause was appealed to the Arches: but the appeal not being prosecuted, it was remitted to the Consistory, where Mrs. Schutz (*m*) was held to have failed in proof of her libel.

were given, and witnesses were examined, and publication was decreed: but there was no final hearing in either court on the merits of the cause. It was appealed to the Delegates (as it had been before to the Arches) on a grievance in December, 1760; and mention of it recurs at various intervals in the Court Book of the Delegates, till the 4th of December, 1762, when the assignation was continued till a day in Hilary, 1763: but no entry of the cause appears afterwards. In the valuable catalogue of the processes in the registry of the High Court of Delegates, digested with great care and industry by Dr. Jesse Addams, the following note is placed opposite the entry of this cause. "*In primâ inst.* Leeds (Hester) *alias* Lamborn, *against* Leeds, in a cause of divorce by reason of impotence in the Consistory Court of London, appealed by the wife to the Arches, and subsequently to the Delegates, on a grievance, *viz.* on the judges of those courts respectively overruling her objection to the report of the physicians and surgeons appointed inspectors of the husband's parts of generation as ambiguous, &c., and incapable of satisfying the Court with respect to his potency or impotence."

(*m*) February 17, 1772.

Grimbaldeston, *otherwise* Anderson, *v.* Anderson. Arches 1778. The marriage was in 1775, the suit was brought in 1777, in the Consistory Court by the wife. The libel was rejected. The judge, Dr. Bettesworth, laying great stress on the time of bringing the suit, there not having been three months' cohabitation,—it was appealed to the Arches; and it appears that in the argument, the counsel (Dr. Wynne) pressed upon the Court the caution which ought to be observed in admitting pleas of this description. The note of the sentence of the (n) judge (Dr. Calvert) is to this effect:—"Court. Impotency a good ground of nullity. Not much weight in argument as to unfavourable suit. Whether the case is such as the Court can redress. The virginity of woman very material. Libel properly drawn: but in this case the opinions of inspectors only must determine; and not sufficient for the Court, as in the words of the libel they could only say it appeared soft and short which does not always continue. Therefore, three years' cohabitation necessary.

Grimbaldeston, *otherwise* Anderson, *v.* Anderson, Consistory 1777. Arches 1778.

Libel rejected for want of three years' residence, only about three months cohabitation.

Schultz *against* Schultz. Leeds *against* Leeds. Larkin *against* Frost."

Harris, *otherwise* Ball, *against* Ball. The parties were married in 1781;—the husband was thirty-four, the wife seventeen years old. The suit was

(n) This note is transcribed from an endorsement in the handwriting of Dr. Harris on the brief from which he argued the case of Harris, *otherwise* Ball, *v.* Ball, Deleg. 1789.

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brought by the wife in the Arches, 1788. The libel was rejected, (o) but upon an appeal this sentence was reversed, and the libel was admitted by the Delegates to proof; the wife, however, ultimately failed in the suit. (p)

Dick v. Dick, Arches. May 24, 1811.

Greenstreet, *falsely called* Comyns, v. Comyns. The marriage was in 1607., the suit in 1812. Sir W. . . . in giving judgment in that case, said—"there is great disposition on the part of the husband to atone for the injury he has inflicted on this lady, being in utter ignorance of his constitutional defects." The libel in that case was drawn precisely in the same form as this;—and why in that case was the man to be presumed to be ignorant of his natural defect, and not so in this?

In the text of the Canon Law, X. (q) lib. 4. tit. c. 9. a case is stated in which a woman applied for a divorce on account of the frigidity of her husband after eight years' cohabitation, and obtained it.

The result of this search is that there are many in-

(o) By Dr. Calvert.

(p) November 24, 1790. The Delegates by their interlocutory decree pronounced that "Hannah Ball had *totally* failed in proof of her libel, and dismissed Thomas Bannister Ball from the suit.

The Judges Delegates who were present at the sentence were Mr. Justice Gould, Mr. Justice Buller, Mr. Baron Hotham, Dr. Fisher, and Dr. Laurence.

Mr. Erskine, Mr. Piggott, Dr. Harris, and Dr. Nicholl, were counsel for Mrs. Harris: Mr. Bearcroft, Sir William Scott, and Dr. Battine, *contra*.

(q) Vol. II. p. 10.

stances of suits having been brought many years longer after the marriage than in the present instance ; but none in which the party seeking redress had been the party labouring under the infirmity ; —at the same time there have been undoubtedly many suits of which no traces can now be found. It is observable also that none of these suits have been promoted by the husband. And would any one pretend to argue, because no case could be found, in which the husband had commenced proceedings, that the husband could not bring the suit. It is impossible to read the passages in the Canon Law on which this doctrine is founded to signify any thing else than that the impotent party might bring the suit.—Every commentator on them has deduced the same conclusion. Sanchez was cited against it at the last hearing :—but his authority was mistaken. It is directly in unison with that of the other commentators, p. 354. ; and the whole of his doctrine on this head was clearly summed up in the 114th disputation which had for its title “ *Utrum conjugii impotenti et viro frigido, aut mulieri arctæ integram sit contra matrimonium proclamare, an potius id jus proclamandi soli competit potenti?* ” Reasons for allowing such a conduct were not personal to the parties ; but had for their object important public interests ; and were founded upon a principle introduced into our law from the canon law to ascertain whether in the language of the canonists there had been *verum matrimonium* or not, and what was the relative *status* of the parties towards each other.

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SETON.

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*Adams contra.*

The cases cited do not affect the point. The interval of time between the marriage and the institution of the suit might not be immaterial in this case :—but time alone could bear but little upon it. The chief object of the Court was to ascertain whether there had been any cases in which the husband had been permitted to institute a suit for the purpose of establishing his own impotency. All the cases cited made out the negative to this position. In *Greenstreet v. Cumyns* the Court threw out its belief that the man was ignorant of his situation ; here, however, the man was forty-five years old at the time of his marriage, and his situation could not be unknown to himself.

*The Court took further time to deliberate.*

Jan. 27.

## JUDGMENT.

Sir JOHN NICHOLL.

This suit is brought by George Norton against Sarah, his wife, to declare his marriage void ;—the libel pleads that the marriage took place in June, 1812; that the husband was a bachelor, aged forty-five years, and the wife, a spinster, aged twenty-three ;—that they cohabited till June, 1819; that they were both in health, but that the husband was incapable, from bodily defect, to consummate the marriage ;—that his defect was incurable by art, as would appear upon inspection by



medical persons.—The admission of the libel is opposed by the wife, who prays to be dismissed.

The question is, whether the Court can entertain this suit ;—whether the husband is entitled to his remedy ;—whether he states facts capable of proof ;—or, whether, if the facts should be proved, the marriage ought to be set aside.

The first objection is, that the suit is of a novel kind. After the best and most diligent search no instance has been found of a party bringing a suit to set aside a marriage on account of his own incapacity ;—the party complaining has always been the injured party, and generally the suit has been brought by the wife ;—there has been but one suit in my recollection brought by the husband, *Wilson v. Wilson*. (a)

The next circumstance is the age of the man. It is incredible that he should have lived forty-five years, and be ignorant of his own bodily defect, which he alleges to be apparent upon inspection. I do not see how his ignorance could be proved ; it is incapable of direct evidence. The presumption is in favour of the marriage ;—besides there was a subsequent cohabitation of seven years before the suit was brought ;—at all events he must have discovered it some time before he applied for his remedy. The maxim then applies, *cur tamdiu tacuit* ?—The lapse of time may act as an absolute bar to the suit not brought by the party injured. In (b) *Ball v. Ball* it was so held by the Delegates ; the modesty of

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(a) *Archives*, 1795.

(b) *Delegates*, 1790.

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the sex may account for forbearance on the part of the woman ;—he has not only defrauded his wife into a marriage whereby he acquires a right to her property, but has kept her during a long cohabitation subject to continual injury, and now is seeking to throw off the burthen of maintaining her:—this increases the weight of presumption against him. Another circumstance not to be passed over is, that the marriage was by licence ;—it is so usual for the man to be the person to obtain the licence that it is to be presumed in this case he did so by his own affidavit ; and he swore he knew of no impediment to the marriage ;—ignorance of the fact is not only not to be presumed, but is almost incredible. Another objection is, that we cannot obtain collateral proof either by the answers of the wife, or by the inspection of her person ;—it has been stated by the husband's counsel that the wife is pregnant ; he cannot, therefore, call upon her to confess that her marriage was not consummated, for she must then furnish evidence to criminate herself. Nor can she allege that she is *virgo intacta*, a species of proof sometimes resorted to.

So that in point of proof the case must rest upon the inspection of the husband by medical men. And can any case be found where sentence has been given on the sole report of the inspectors ? —This species of proof, even as collateral, is always received with caution. I am not aware that it has ever been held sufficient alone ; and if not in any former case,—is it to be first taken in this

case, where the wife is said to be pregnant? The Court is called upon not merely to pronounce against the marriage, but to bastardize the issue. Is there any case in which bastardy has been established on the frigidity of the husband; or by any proof, but that of non-access.—There has been a cohabitation of seven years; frequent endeavours to consummate; and the Court is called upon to say that the issue is not of that person *quem nuptiæ demonstrat*.

Under these preliminary observations on the circumstances of the case it would be necessary, in order to support this suit, that the law authorities should be clear beyond all possibility of doubt.—It has been said that the public has an interest that the real state of the parties should be ascertained, and that is true where the marriage is void under the marriage act: but this is a voidable marriage, and laid down to be so by Blackstone. Then here the state is ascertained. The marriage exists.

The sole authority in support of this suit is the text quoted from the Canon Law;—it is necessary to examine how far that law applies to this case, and how far it has been received in this country. X. 4. 15. 1. If a man alleges his frigidity, and wife alleges the same, and can prove the same, by seven compurgators, they may be separated.

X. 4. 15. 4. If a man contract, knowing the defect of the woman, he is not to come for a remedy.

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Many learned commentators have been referred to: but they leave the text much as it appeared at first. Sanchez, in his seventh book, has written a large Commentary on Matrimonial Law; upwards of 400 pages *De Impedimentis*. In his last disputation he considers it still as a question whether the impotent party may apply for the divorce; and he holds he may, under circumstances; but limits it by certain restrictions;—*quando illius ignarus fuit tempore matrimonii; aliter minime auditur*. But let us examine how the text and commentators apply to the present case. The Text applies to frigidity, which may be unknown before trial;—but here the bodily defect is stated to be apparent. In the next place the wife must join in the statement *eadem affirmans*: but here, she resists the suit. So far from joining in it, her pregnancy is proclaimed. But collateral proof is also required: it must be proved by seven compurgators; a mode of proof not used here, and which we cannot have instead of inspection and answers.

By the Canon Law the marriage is not absolutely dissolved; the parties are separated; and if the church is deceived, the former marriage is to be renewed; and if a second marriage is contracted, it becomes null and void. What a state to place the parties in! This is something in the Text Law which I cannot readily assent to belong to the law of this country. If the marriage was contracted *scienter*;—the party knew of the defect, and he could not be heard. The assertion of the defect in himself raises the presumption that he con-

tracted the marriage *scienter*, that he cohabited *scienter*, and defrauded the woman.

If the Canon Law is to govern the case, the text referred to does not come up to the point;—even if it did, something more would be to be shewn, namely, that it has been received as the law in this country;—it might not be necessary for this purpose to shew a case precisely similar; it would be sufficient to shew that it is according to the general rules observed here. But it is a strong, and almost a conclusive, presumption against the present proceeding that no suit appears ever to have been brought by any but the injured party.

Ayliffe (n) has been quoted : but he refers merely to the text of the Canon Law. Another authority has been cited from the opinion of counsel : but that was on the case of a woman. The opinion of any person of higher authority cannot be produced than of that person : but it cannot be considered as an authority applying to this case. The Court does not mean to lay it down that in no possible case, or under no circumstances, a woman may not be allowed to bring such a suit. But even if the Canon Law is direct on the point,—is it according to the Law of England to receive such a suit? It is a maxim that no man shall take advantage of his own wrong : it is the principle of the Canon Law itself, the principle of reason and justice. There is no instance of a suit brought by a person alleging his own incapacity : there is so strong a pre-

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(a) Parergon, p. 227.

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sumption for the marriage that no sentence is ever pronounced against it, except on the fullest authority ; and if a mistake is made, the marriage is not held dissolved, but to be renewed. This is a situation in which the Law of England would not place the parties. On the whole I am not satisfied that the party would be entitled to the sentence prayed. — I reject the libel, and dismiss the suit.

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CONSISTORY COURT OF LONDON.

1820.  
*Hilary*  
*Term,*  
*February 9.*

COOPER and Others *v.* ALLNUTT.

**T**HIS was a suit promoted by James Cooper, one of the churchwardens, and by other parishioners and inhabitants of the parish of All-hallows Barking, in the City and Diocese of London, against John Allnutt, one of the churchwardens elect of the said parish, to compel him to take the churchwarden's oath of office. A churchwarden duly elected by his parish directed to take the oath of office.

It appeared that the 22nd day of April, 1819, Mr. Allnutt had been proposed and unanimously elected churchwarden for the ensuing year, and had been served with a notice to appear before the Official at the Visitation of the Archdeacon of London, and to take upon himself the office of churchwarden: but he refused to comply with this notice, alleging that he was prevented by deafness from fulfilling the duties of the office.

On the 26th of January, 1820, he was cited to appear before the Vicar General and Official Principal of the Consistorial and Episcopal Court of London (who exercises a concurrent jurisdiction as to

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subjects of this description, with the Official of the Archdeacon) to *appear and take the oath usually taken by Churchwardens of the parish of All-hallows, Barking.*

*Lushington*

Moved the Court to compel John Allnutt to take upon himself the office of churchwarden.

No appearance was given for Mr. Allnutt.

JUDGMENT.

SIR WILLIAM SCOTT

Directed Mr. Allnutt to take the oath before the proper ordinary.

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ARCHES COURT OF CANTERBURY.

The Office of the Judge promoted by  
JARRATT against STEELE.

1820.  
*Hilary*  
*Term,*  
*Jan. 27.*

*By Letters of Request from the Consistory Court of  
Bath and Wells.*

**T**HIS suit was instituted by the Reverend Robert Jarratt, vicar of Wellington, in the county of Somerset, against Frederic Ferdinand Armstead Steele, lessee of the Great Tithes, for having, in September, 1818, without any competent authority pulled down several pews, and erected others in the chancel of the church of the parish.

A lessee of an impropriator of great tithes canonically punished for breaking open the church door with intent to erect pews in the chancel.

The articles alleged that Mr. Armstead had, on the 27th of August, 1820, clandestinely caused a key of the church door to be made by which he had introduced workmen into the chancel for the

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JARRATT  
v.  
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purpose of preparing for the erection of pews in the chancel.

That the vicar having ordered a new lock, he, on the 17th of September, caused the door to be forced open, and again brought workmen into the chancel, who, by his order, pulled down part of two pews, and laid the foundation for two new ones.

That the door being secured and bolted, and he being warned by the vicar to desist, on the 18th of September, broke open the belfry door, and one of the gallery doors ; and thus admitted the workmen, and boasted that they could not keep him out of the church.

That, on the evening of the 19th of September, the doors having been fastened, he applied to the vicar to admit him into the chancel at half past ten o'clock at night ; which he refused to do at so unseasonable an hour. To which he replied, " As soon as you are gone I will get in ;" and added, " I will be in within half an hour."

That, on the 25th of September, the workmen, under his orders, stript off part of the roof from the top of the chancel, and broke through the ceiling ; and, descending into the church, removed the inside fastenings from the doors, put on a roller lock, and proceeded with the work in the chancel.

The articles were admitted on the 10th of July 1819.—On the 4th of December, 1819, a negative issue was given.—On the 9th of December 1819, the negative issue was retracted, and an firmative issue given.

*Swabey for the Rev. Robert Jarratt.*

*No counsel appeared on the other side.*

**JUDGMENT.**

**Sir JOHN NICHOLL.**

This suit is brought against Frederic Ferdinand Armstead Steele for having forcibly entered the church of Wellington, pulled down two pews, and erected others in the chancel ;—he was cited to answer to this offence ;—the proceedings are instigated by the vicar of the parish. In consequence of the citation articles have been given in. These articles set forth the circumstances of the case which have been fully stated by the counsel, and conclude with praying that the party proceeded against may be canonically punished and corrected ;—that he may be admonished to restrain from such excesses in future ;—condemned in the costs of the suit ;—and ordered to remove the pews he has erected, and to restore the chancel to the state in which it was.

To these articles a negative issue was at first given ; that has been withdrawn : an affirmative issue has now been given, and a proxy to the proctor to give it.

By giving an affirmative issue he confesses the facts charged, and submits himself to the law ;—and certainly, if the facts stated are true, he has been prudently advised, and has acted wisely in so doing. The facts are most reprehensible, and his illegal conduct has been contumaciously persisted in.

All persons ought to understand that the sacred edifice of the church is under the protection of the Ecclesiastical Laws as they are administered in these Courts ;—that the possession of the church

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is in the minister and the churchwardens ;—and that no person has a right to enter it when it is not open for divine service, except with their permission, and under their authority. That pews already erected cannot be pulled down without the consent of the minister and churchwardens, unless after cause shewn by a faculty or licence from the ordinary.

Here an individual, without any pretext or authority whatsoever, repeatedly breaks into the church by violence, pulls down the old seats, erects new ones, breaks a hole into the roof of the church, and thus descends into the chancel, after repeated admonitions from the minister to forbear.

By giving an affirmative issue, however, he has shewn that he has become convinced of his error and improper conduct ;—and on that account the Court is unwilling to proceed against him with rigour.—I shall, therefore, only condemn him in the costs of the proceeding ;—admonish him to pull down the seats he has erected, and to replace those he has pulled down, and to reinstate the chancel as it was :—and to do this I shall allow him till the first day of next Term, when I shall expect him to certify that he has complied with this sentence.

Trinity  
Term,  
June 22.

The proctor for Mr. Steele alleged that he had obeyed the *monition* served upon him by order of the Court, and the Judge dismissed him from the suit.

*The Office of the Judge promoted by*  
**DOBIE v. MASTERS.**

1820.  
*Hilary*  
*Term,*  
Jan. 27.

*By Letters of Request from the Chancellor of*  
*Winchester.*

**PHILLIMORE**

Moved the Court in the behalf of Alexander Dobie, of the parish of Saint Clements Danes, to allow the office of the judge to be promoted against the Reverend John Whalley Masters, Rector of Chorley, in Lancashire, in a cause of Simony; and to permit a citation to be taken out against him for having purchased the immediate possession of the vicarage of Saint Nicholas, in the castle of Carisbrook, in the Isle of Wight.

The ecclesiastical courts have jurisdiction to try questions of simony.

He stated that there could be no doubt as to the jurisdiction of the Court on a question of this description; for that the statute of the 31st of Elizabeth specially guarded against taking away the right of the Spiritual Courts, and that subsequent to the passing of that act many dicta were to be found in books and adjudged cases which seemed to countenance the idea that the Ecclesiastical Court

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was a more suitable forum on questions of simony than the Temporal Courts. *Risby v. Wentworth*, (a) 40th of Elizabeth. *Baker v. Rogers*; (b) and in both which cases prohibitions had been refused.

In (c) *Boyle v. Boyle*, Pollexfen, Justice, in pointing out that the Spiritual Courts might have jurisdiction in some respects over the same subject matter as the Temporal, used this illustration. "So, after a man is found no simonist in this Court, the Ecclesiastical Court may very well examine the same matter." No doubt exists on this point in

(a) *Risby v. Wentworth*. Prohibition upon a sale for tithes; and grounds his prohibition upon the statute of 31st of Elizabeth, supposing that the said parson had committed simony in coming to the parsonage; and thereby the church was void, and the tithes not appertaining unto him. And it was agreed, *per Curiam*, Glanville *absente*, that a prohibition lay not; for the simony might more aptly be tried in the Spiritual Court, Croke Eliz. 642.

(b) All the Court held that the prohibition lay not: for as to the first, although the presentee came in *quasi per usurpation*, yet because it is by means of a simoniacal contract which is the cause thereof (for otherwise it is to be intended that he would not have permitted that presentment) it was held that it was as well a simony as if the grant had not been void.—And, as to the second, they held it to be simony; for there be not any accessories in simony; but all are principals therein, as well as in trespass; and it appertains to the Spiritual Court to determine it, and not to this Court to meddle therewith. And when the Spiritual Court hath so sentenced it, this Court ought to give credence thereto, and ought not to dispute whether it be error or not, &c. &c. &c. Croke Eliz. 789.

(c) *Boyle v. Boyle* was a case in which a prohibition was moved for to the Spiritual Court in a cause of jactitation of marriage. Com. 72.

any of the writers who have treated on the subject: Degge (*d*), Bishop Gibson (*e*), and the Author of Watson's (*f*) Incumbent.—The books of practice too are clear and explicit. In Clarke's *Praxis* the mode of proceeding is pointed out. Si (*g*) *clericus commisit simoniam in obtinendo beneficium ecclesiasticum, potest sive ex officio judicis, sive ad instantiam partis conveniri ac juxta sanctiones canonicas puniri, sic etiam laici participes ejusdem criminis.*

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This passage has been adopted by Oughton to its full extent *h*).

JUDGMENT.

Sir JOHN NICHOLL

Said the authorities were satisfactory with respect to the principle: but directed a search to be made for any cases which might have been decided in the Ecclesiastical Courts.

(*d*) The fourth paragraph (of the 31st of Elizabeth) preserves the Ecclesiastical jurisdiction that they may proceed judicially to censure the parties for their corruption in buying and selling church preferments. Wherein, as should seem, the Ecclesiastical Laws, in some circumstances, are more severe than this statute; for by that law, as I take it, he that is convicted of simony is after incapacitated not only to that living, but to all other church preferments: but of this be informed by the canonist. Degge, p. 61.

(*e*) Gibson, 798—801.

(*f*) Watson's Clergyman's Law, c. 5.

(*g*) Clarke's *Praxis*, tit. 132.

(*h*) Oughton, Vol. 1. tit. 4.

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Term.
Feb. 3.

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 v.
 MASTERS.

Phillimore

Cited the case of the office of the Judge promoted by *Lucy v. The Bishop of Saint David's* (i) in which the Delegates were unanimously of opinion that the Ecclesiastical Court was fully competent to try the question ; and finally affirmed the sentence of the Inferior Court, by which the bishop had been found guilty of simony.

Per Curiam.

Let the citation issue.

Easter
Term.
May 8.

There having been a misnomer in the citation, it was alleged, on the part of Mr. Dobie, that he proceeded no further in that suit ; and the same day fresh Letters of Request from the Chancellor of the Diocese of Winchester were presented and accepted by the Dean of the Arches, and the cause was commenced anew between the same parties.

(i) Deleg. February 22, 1699. The Court was composed of a full commission, consisting of several Temporal and Ecclesiastical Peers, besides Common Law Judges and Civilians. Treby, Chief Justice of the Common Pleas ; Ward, Chief Baron of the Exchequer ; and Sir Charles Hedges, Judge of the Admiralty, were of the number.

The suit was originally promoted before the Archbishop of Canterbury (Tenison) in a Court held at Lambeth, before the Archbishop in person, assisted by six suffragan bishops.—Lord Raymond, 447, 539, 545, 817. 2 Warn. 656. Gibs. 1006. Bishop Burnet has given an account of the trial and deprivation of this bishop, Vol. II. 226. and again 250.

The citation having been served and returned into Court, Denne, proctor for Mr. Masters, exhibited, a proxy and prayed articles.

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The articles not being ready, further time was prayed on *behalf of the promoter*. To this, objection was taken by the proctor of Mr. Masters;—the judge said that in criminal suits the rule was always observed that articles should be exhibited on the next Court day after they had been prayed, and dismissed the suit.

June 22.

IN THE COURT OF CHANCERY AT CANTERBURY.

ZACHARIAS v. COLLIS.

JUDGMENT.


Sir JOHN NICHOLL.

This case respects the will of J. Malbon, an officer in His Majesty's Navy. It is propounded by Zacharias, the sole executor and universal legatee named in it, and opposed by Mrs. Collis, a sister of the deceased, who, with three other sisters, and a brother, are his next of kin.

As the will of a person in the sea service, it rests, in some respects, on peculiar considerations; for it is the policy of the law of this country, and of several others, to grant special indulgences, and to extend special protections to the testamentary intentions of this class of persons. In some particulars they are excused from observing the formalities required from other members of society, as in the case of nuncupative wills. While, on the other hand, greater formalities and special modes of attestation are in some respects required

as to their written wills ;—not, however, for the purpose of imposing restraints and disabilities upon them, but in order to protect them against fraud and imposition, and to secure due effect to their real testamentary intentions. In both respects the law appears to be founded in reason and justice :—for it is to be observed that this class of persons, generally speaking, are, in early life, separated, in a great degree, from the rest of society ; and have not the same opportunities which others have of acquiring, imperceptibly, the knowledge of ordinary business and its forms. They may, therefore, be allowed, in some circumstances, to dispose of their property by will with less ceremony : but for the same reasons they are more liable than others to imposition, and to commit acts of imprudence. They are generally careless, unguarded, openhearted, and little prepared to defend themselves against the artful and designing part of mankind ; yet they are more frequently under the pressure of urgent wants ; and to procure an immediate supply to those wants (such as an outfit and the like) they will, without thought, comply with almost any conditions proposed to them, not weighing, or even being aware of, the future consequences. These temporary necessities operate upon them as a sort of duress, on the part of those who are to furnish the supply. These are partly the considerations on which the policy of the law is extended to guard the testamentary acts of this class of persons. Their wills are, in some respects, exceptions to the rules applicable to ordinary cases ; not indeed exceptions to the great fundamental principle of all

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Term.*

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testamentary dispositions, *the intention of the testator* ; but to some of the rules and presumptions by which the real intention is to be ascertained.

In this view, approaching the facts of the present case, I may properly look first at the history and character of the deceased party, in order to see how far these general considerations apply to the individual.

The deceased went early in life into the naval service. He became a lieutenant in 1804. He seems to have possessed a full share of that general character which belongs to his profession. He is described by those witnesses who intimately knew him, as "extremely careless," "inattentive to business," "unsuspicious, and would sign any thing put before him." We find him returning from sea in 1811, having, as lieutenant, commanded two small vessels : but so negligent in keeping his books, that his accounts could not be passed ; and his pay and allowances were in consequence stopped. His own agent, Mr. Stanger, though probably not indisposed to assist him, was yet so far in advance that he would advance him no more ;—and the deceased was at that time in considerable embarrassment.

It does not appear whether he made any applications to his relations, nor whether they were in circumstances to assist him ;—he was one of rather a numerous family, having a brother and four sisters.

Such was the character and situation of the deceased a short time before the date of this will, which is June, 1811. It appears that he went to

Portsmouth either in search of employment or of pecuniary assistance, or of both; for shortly after his return to London, in July or August, he told his uncle, Mr. Malbon, the witness, "that he had been obliged to apply to a Jew at Portsmouth; and to give him a power of attorney to act for him as his agent in order to get him to advance him some money."—This is the deceased's own account of his first acquaintance with the executor and universal legatee named in this instrument. It accords also with the result of the evidence given by Zacharias's own witnesses;—for it is in no degree proved that any previous intimacy or regard subsisted between the parties;—or that any other consideration led to this will, than the advance of money.

This brings me to the evidence offered in support of the *factum* of the instrument; and certainly it is as meagre as can well be imagined.

It may hardly be necessary to observe that the *factum* of an instrument means, not barely the signing of it, and the formal publication or delivery, but proof in the language of the *condidit*, "that he well knew and understood the contents thereof," "and did give, will, dispose, and do in all things as in the said will is contained." It is true that, under some circumstances, all this may be proved by presumption only, arising from the mere act of signing: but, under other circumstances, more direct proof of the "knowing and understanding," of the "willing and disposing," may be necessary.

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CASES DETERMINED IN THE

On the *condidit*, which pleads the *factum* of this will, two witnesses have been examined ;—one the shopboy of Zacharias; the other, a friend who was in the habit of lending his aid in attesting similar instruments. The former, *Morris Jacobs*, who, at the date of the instrument, was under seventeen years of age, deposes in substance as follows :—
“ That he went to live with Zacharias, a navy agent and shopkeeper, in Point street, Portsmouth, as clerk, and to attend his shop, in 1811, and continued in his employ until November, 1812. That he had no knowledge of Malbon till some time after he had been in Zacharias’s employ :—but before June he had seen Malbon, who was then a lieutenant, several times at Zacharias’s house, with whom he appeared to be rather intimate ;—and who, to deponent’s knowledge, had done services to the deceased, by assisting him with money more than once previous to the said month of June. That on a day in June the deceased, who had not got a ship, had called on Zacharias, and was sitting with him in a parlour behind the shop. Deponent was called by Zacharias from the shop into the parlour ;—and Mr. Rumley, a slop-seller, and near neighbour of Zacharias’s, was sitting with them. That Zacharias then gave deponent a printed form of a will, which he had previously filled up in his own handwriting, and told deponent that Lieutenant Malbon had already read it, that it was his will ;—but that he, the deponent, was then to read it over to him ;—that deponent thereupon immediately read the said will all over, audibly, slowly, and distinctly, to

Lieutenant Malbon, in the presence of Rumley and Zacharias ;—that the deceased appeared to approve the same, and immediately executed it by signing his name, and by sealing it, and by publishing it as his will." He then states that Rumley and he attested it ;—and that the deceased was of sound mind. " That, immediately after the transaction was completed, he saw Zacharias give the deceased some bank notes." He says to the fourth interrogatory,—“ That Zacharias was a Navy agent, and kept a shop for the sale of slops and other articles.”

Sixth interrogatory,—“ That he has no recollection of having seen the deceased at Zacharias's house after he executed his will.”

Eighth interrogatory,—“ That he supposes and believes the deceased was, at the time of executing the will, indebted to Zacharias for monies advanced to him ;—he does not know whether there was or was not any intention on the part of the deceased to benefit Zacharias further than by enabling him, as executor, to satisfy the debt due to him out of his effects ;—or whether the deceased did or did not intend to deprive his relations of all his property after payment of his debts ;—nor can the respondent form any belief on the subject.”

Tenth interrogatory,—“ That Rumley is a wholesale and retail slopseller in Point street.”

The other witness, *Rumley*, deposes, “ That he has been acquainted with Zacharias ten or twelve years ;—and having always had a good opinion of him, as being a man very correct and particular in the transaction of his business, he hath frequently

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attended at his house, and seen many instruments such as orders for prize-money, wills, and powers of attorney, executed by seamen and officers, and has attested them;—at some times he did not see the person write his name;—but then he invariably saw such person seal and deliver such power of attorney or will, “as his act and deed;” and asked him if the signature was his handwriting, and took care to be quite satisfied that the person, so executing the same, was not intoxicated, and was of sound mind.”

He then says, “that he cannot bring to his recollection either having ever seen the deceased, or any part of the transaction;”—but, seeing his own signature of the attestation, he says, “he is quite certain he either saw the deceased sign his name, or seal and deliver the same “as his act and deed;”—and did also fully satisfy himself that the testator was quite “sober and of sound mind.”

To the eighth interrogatory he says, “that he cannot answer whether the will was or was not executed as a collateral security for the payment of any debt; neither can he form a belief whether there was or was not any intention in the deceased to benefit Zacharias, farther than by enabling him, as executor, to satisfy any debt due to him out of the effects, nor whether he did or did not intend to deprive his relations of all his property after payment of his debts.”

This is the whole evidence of the *factum*; and it amounts only to proof that the deceased did execute some instrument. The lad *Jacob* says that Zacharias desired him to read it over to the de-

ceased, and he read it accordingly. This seems a strange ceremony to be performed by this shop-boy to an officer in full health, who (as Zacharias said) had himself read it before. *Rumley* has no recollection of any such ceremony:—nor was it one of those ceremonies which he, in his great caution, was accustomed to require. *Jacobs* says that the deceased published it as his will. *Rumley* says, “that the usual form of executing powers of attorney and wills was to seal and deliver it *as his act and deed*,”—which, in truth, is the common way of executing sealed instruments such as this is upon the face of it. Without then giving implicit belief to every syllable stated by *Jacobs* speaking upon a recollection of five years;—frequently (it may be presumed) called in like *Rumley* to attest wills and powers;—nothing in this particular transaction to fix minute circumstances upon his memory:—there is no proof that the deceased knew the nature and import of the instrument which he executed, or that he himself declared it to be a *will*. The more natural instrument for an officer to execute to his agent was a *power of attorney*;—his own description to his uncle, on his return to London, is, that “he had given him a power of attorney to act for him as his agent in order to get him to advance him some money.”

But it is urged “here is execution by a person in full health and capacity, and you must presume knowledge of the contents and import of the instrument;” and in ordinary cases the observation is true;—but it is for the consideration of the Court whether the same presumption arises under the cir-

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cumstances of the case. Here is a distressed young officer, naturally of a very careless turn in matters of business, getting supplies of money from the slopseller, ready to sign any thing that might be put before him as a security ;—and here is the slopseller, for the advance of a few pounds, obtaining a security which may convey to him thousands, in exclusion of the testator's nearest and dearest relations ;—and, in addition, here is this striking circumstance that, immediately upon the execution of the instrument, Zacharias hands him over some bank notes ;—looking more like the valuable consideration advanced for some security, than accompanying the voluntary disposition of property by will. It seems hardly possible not to suspect that some imposition was practised, and that the deceased was ignorant of the nature and effect of the instrument which he signed. The transaction takes place in this back-room behind Zacharias's shop. No intervention of any professional person. The instrument filled up by the most suspicious of all persons, by the executor and universal legatee himself ;—a printed instrument with the King's arms at the top, and a seal at the bottom, like a power of attorney, or legal security ;—only Zacharias's friend and the shop-boy present ;—and, what is singular, it is not stated even by the lad, whose memory is so good, that the deceased uttered one single word in the whole course of the transaction, except the mere formal execution. Here he is in distress ;—anxious to get his money, signs the instrument, without any great probability that he attended to the lad's reading it,

(if he did read it) receiving the bank notes and the whole is finished ;—for Jacobs, though he lived seventeen months subsequently in Zacharias's service, never saw the deceased afterwards.

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Here is no previous declaration of any intention to dispose of his property by making a will in Zacharias's favour leading up to this act ;—here is no evidence of any subsequent recognition by mentioning that he had executed this will, or done any act to benefit Zacharias, except the declaration to his uncle that he had given him a power of attorney to act as his agent.

It becomes proper then to consider whether the instrument is proved to have been executed as a will, or only as a security for a debt ;—and if as a security for a debt from a seaman to his agent, whether it will have the legal operation of being something which it was not *intended* to be, namely, a testamentary disposition of the deceased's whole property in exclusion of his relations.

To lead to such a will, there is no appearance of any previous intimacy or regard ;—there is no trace of the deceased having had any knowledge of Zacharias till he went to Portsmouth a short time before the date of the instrument.

That the instrument was given merely as a collateral security for a debt ;—direct evidence can hardly be expected. The Court can only have circumstantial evidence :—and proof of that sort is sufficient. The circumstances satisfy me in this case ;—even the attesting witnesses will not venture a *belief* that it was executed for any other purpose.

It is said in argument that there is no proof of

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a will and a power of attorney having been executed at the same time ;— but Zacharias has not produced any power of attorney, nor proved that any other instrument than the will was ever executed. Take it either way ;—either that only one instrument was executed, or that two were executed. If only one, then here is the deceased's own declaration that it was a power of attorney. If two instruments, then the case comes more directly in circumstances within the authority of the leading case of *Craig v. Lester*, to which I shall presently advert.

The executor, aware that collateral aid was necessary to support the *factum*, gave in a supplemental allegation, pleading continued affection, declarations and recognitions of this will ;—but the proof has totally failed. The only witness produced to it is Laing, a shoplad, who succeeded Jacobs ;—and all he says is, that he overheard some conversation in which the deceased, after his return from abroad, expressed obligations to Zacharias. Supposing the conversation overheard to be as stated, it is not inconsistent with the deceased's ignorance of the nature and contents of this instrument. It might only accompany an assurance that he would immediately discharge his debt ;—that he, Zacharias, should be the first person that he would pay out of the prize-money he had acquired :—for the fact is, that he immediately paid him, and took all his concerns out of his hands.

It is quite clear that he was suspicious of him, and was displeased at a difficulty in getting back some money he found out that he had overpaid

him ;—and was obliged to take a watch as one mode of balancing the account.

It is unnecessary to go minutely through the history of this part of the case ;—but it may be proper to observe that though the Court can seldom rely on single declarations as evidence of intention, yet the uniform tenour of declarations to confidential friends is of considerable weight.

The deceased, in his unreserved intercourse with his messmates, while abroad, with whom he was particularly intimate, never speaks with regard of Zacharias, nor recommends him to their notice ;—he remits home two thousand pounds, not to Zacharias, but to Findlay and Co. Immediately on his return he again appoints Stanger to be his agent, and pays off Zacharias.

Residing in London from that time till his death, being about five months, he repeatedly talked over his family affairs with his uncle, and some other old friends with whom he lived in the most unreserved confidence ;—he spoke of Zacharias in terms of great harshness and reproach. He talked of making a will, and of disposing of the bulk of his property to one favourite sister, Mrs. Collis, in preference to his other sisters, and his brother ;—he had even made an appointment with a professional person in order to carry these testamentary intentions into effect ;—but died unexpectedly before the time appointed. In all these conversations there was no hint that Zacharias was to be an object of his testamentary bounty ;—no suggestion that he had ever made a will in his favour :—on the contrary, he declared “ he had made no will.”

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This evidence bears upon the case, not as admissible to affect the validity of an instrument, the *factum* of which had been fully established ;— but as tending to shew that the deceased never knew or intended this instrument to be a will ;— that he supposed it to be a mere power of attorney, or a collateral security for the repayment of the money Zacharias had advanced to him.

Another part of the evidence may bear upon the case in the same way ; and further, it may raise some question upon the point of revocation.

The deceased had desired Zacharias to deliver up all his papers. Zacharias sent an order to his sub-agents, in London, Hunt and M'Adams, to deliver them up ; and they professed to have done so. The deceased desired a friend who was going to Portsmouth, in December, to call on Zacharias, and to enquire if he had any other papers. This witness accordingly applied to Zacharias, who told him he had delivered up all papers. " That he had no papers whatever belonging to the deceased in his possession. That he had long before sent them all to Hunt and M'Adam, in London ;—but that he would look again." Some days afterwards Zacharias told the witness " that he had looked through his papers, and that he had not a single paper belonging to Mr. Malbon." And yet all this time Zacharias had in his possession this will which he never produces till after the deceased's death ;— but immediately on the death he produces it, coming up from Portsmouth, and is sworn to the probate in four days after Captain Malbon died.

Looking to the whole tenor of the evidence,

there appears no doubt that if at this time, about a month or six weeks before the deceased died, the will had been delivered up, it would have been cancelled. Captain Malbon might indeed have been surprised by the appearance of such an instrument; for, in these enquiries after his papers, there is no allusion whatever to any will being in Zacharias's hands;—but, if any belief is due to the evidence, it is almost morally certain that the deceased would, in some manner, have revoked this will, had it not been fraudulently kept back and concealed by Zacharias. Captain Malbon, however, died while intending to make a will quite of a different tenor:—that intention was intercepted in its progress by unexpected death.

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These are the facts of the case;—and out of these facts the Court is to consider the legal result.

The statute of William, in consideration that wills and powers of attorney were obtained from seamen without them being aware of their contents and effect, rendered the will absolutely void, if embodied in the *same* instrument with a power of attorney; thus holding the presumption conclusive *juris et de jure* that the party did not know and intend that the instrument should operate as a testamentary disposition.

The case of *Craig v. Lester* (a) followed not long

(a) Deleg. 11th June, 1714. Mr. Justice Blencow, Mr. Baron Bury, Sir Nathaniel Lloyd, (the King's Advocate,) Dr. Herriott, and Dr. Hencham, were the Judges' Delegates present when sentence was given.

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after the statute ;—and in that case Sir Charles Hedges decided, and his sentence was affirmed by the Delegates, that the will was invalid, though executed on a different instrument. It was in that instance executed at the same time with a power of attorney, and by a seaman in favour of his agent as a mere security for a debt. It has been said that this was a bold stretch of the statute. It is, however, to be recollected that this was not a restraining, but a remedial and protecting statute, in order to defend this valuable, but unguarded, class of persons, against fraudulent imposition. It was not going beyond the spirit of the statute, nor departing from the principles of law and sound reason, to hold that an instrument, understood to be for one purpose, should not have an operation quite different, and much more extensive, when obtained from an unguarded seaman in the hands of his agent.

In the case of *Leake v. Harwood*, before Doctor Bettesworth, the will was set aside “as a security for a debt.”

In the case of *Anderson v. Ward*, before Doctor Bettesworth, 1749, the will was set aside “as a security for a debt,” though there was evidence of the deceased having declared that his wife had used him ill.

In the case of *Moore v. Smart (b)* (or *Stevens*)

A mariner's  
will given as  
a security for  
a debt, set  
aside.

(a) *MOORE*, formerly *ARUNDELL*, Attorney of *MOORE*, against  
*STEVENS*, Attorney of *SMART*, and *SMART*.

*Dr. Jenner for Moore.*

John Smart, mariner, on board the *Augusta* man of war,



before Sir George Lee, in 1753, from a note in the handwriting of the learned judge himself who decided the case which has been furnished by Dr. Phillimore, it clearly appears that the will was set

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made his will on December 14, 1745, and appointed Thomas Moore his sole executor and universal legatee, who is now abroad, and acts by his wife as his attorney. The deceased gave instructions to Mr. Pike, of Plymouth, for making this will, who drew it up accordingly; and it was executed at the house of Dr. Martyn, then Mayor of Plymouth, who, together with the said Pike, and one Norton, witnessed it. Elizabeth Moore, as attorney of her husband, propounded the will; and it was first opposed by the deceased's mother; but is now, since her death, opposed by Stevens, as attorney for Christian and Hellen Smart, the deceased's sisters.

*Dr. Hay for the sisters.*

Martyn and Pike, two of the subscribing witnesses, were utter strangers to the deceased; and Newton, the third witness, is not examined, or any account given of him. The identity of the testator is not sufficiently proved; but if it was, the will was only made to secure a debt from the deceased to Moore; and is, therefore, void by stat. 9 & 10 W. 3. —. We have not pleaded.

#### EVIDENCE FOR MOORE.

##### I. *William Martyn, M. D.*

John Smart, the testator in this cause, on or about December 14, 1745, applied to the deponent, as Mayor of Plymouth, to witness his will. He produced a will ready written, and duly executed it in the presence of the deponent and the other subscribing witnesses, and was of sound mind.

Second interrogatory.—The said Smart was an utter stranger to the deponent: he believes he executed a letter of attorney at the same time.

##### II. *Abraham Pike.*

John Smart, mariner, of the Augusta (as he styled himself)

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aside on the ground of its having been merely a security for a debt. Sir George Lee held this to be a settled point. The ground is so stated clearly and distinctly by the judge himself as the

gave the deponent instructions for the will propounded: the deceased afterwards proved and executed it in the presence of Dr. Martyn, Norton, and the deponent, and was of sound mind.

Second interrogatory.—To the best of the deponent's memory Smart executed a letter of attorney to Moore at the same time.

Third interrogatory.—Smart was an utter stranger to the deponent.

Sixth interrogatory.—Cannot depose whether the will was made to secure a debt or not.

III. *Robert Inis.*

The deponent well knew John Smart, of the *Augusta*, who he takes to be the testator in this cause. The deponent and he went together, in the *Ruby* man of war, to the East Indies, where Smart died.

Second Interrogatory.—Verily believes, but cannot positively depose, that John Smart, the testator in this cause, and he that died in the *Ruby*, was the same person.

Sixth interrogatory.—Believes that the will was made to secure a debt to Moore.

Seventh interrogatory.—Believes the name John Smart to the will is the said Smart's writing, but cannot be positive.

Eighth interrogatory.—Has heard and believes that the deceased was indebted to Moore at his death; believes the will and power was a security for the said debt.

IV. *Judith Hall.*

The deponent knew John Smart of the *Augusta*, afterwards of the *Ruby*; believes he was the testator in this cause, for he was an acquaintance of Moore's, and indebted to him.

Sixth interrogatory.—Believes the will was made to secure

foundation of his sentence. It does not appear to have been considered as at all important that a power of attorney should have been executed *at the same time* ; nor would that circumstance operate as

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debt, for the deponent has heard Elizabeth Moore say the surplus of the deceased's effects after her husband's debt was paid was to go to Smart's mother.

Eighth interrogatory.—The deponent knows that Smart the deceased in this cause was indebted to Moore, and believes the security for the said debt was the will.

V. Thomas Christy

Believes the deceased, John Smart, in this cause was the same John Smart that died in the Ruby.

Sixth interrogatory.—Does not believe that the deceased intended to leave all his effects to Moore : but only to secure his debt to him.

Seventh interrogatory.—The respondent has seen the deceased write. The name subscribed to the will looks like his writing : but cannot be positive it is so.

Eighth interrogatory.—Knows the deceased was indebted to Moore ; heard him say he had given a will, power, and bond, to the said Moore, to secure the said debt to him.

Dr. Jenner for Moore.

Identity is proved from the several witnesses taken together : they should have pleaded that the will was made to secure a debt ; it ought not to be proved upon interrogatories, because we have no opportunity of counterpleading.

Dr. Hay for Smart.

Craig and Leicester, Prerog. December, 1713, and afterwards in Deleg. Harwood and Lake, Prerog. January, 1739. Anderson and Ward, Prerog. Trinity Term, 1756. In all those cases the wills of mariners were set aside, because they were made only to secure debts.

JUDGMENT.

I was of opinion the identity of the testator was tolerably

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any guard or protection to the seaman, being so easily evaded by executing the instruments on different days. The true principle always relied upon has been that an instrument executed as a security for a debt shall not operate as a disposition of the whole property, unless the intention that it should so operate be made clearly to appear. But where that intention has been shewn, the wills have been established.

In the case of *Hay v. Mullo*, 1756, (c) before the

well proved : but I thought it sufficiently appeared that this will was made to secure a debt to Moore ; that from the cases cited and others it was a settled point that wills made by seamen to secure debts were void ; that the evidence, therefore, had generally arisen upon interrogatories, and not upon pleas ; particularly it was so in the case of *Ivis against Preston and Brown*, Prerog. June 25, 1741, where the proof was much slighter than in the present case : but yet that will was set aside.

I, therefore, gave sentence against this will of Smart's, and pronounced him to be dead intestate, so far as appeared to me = but did not give costs.

From Sir George Lee's Manuscript Notes.

(c) *HAY against MULLO*, Prerog. June 23, 1756.

George Hay, a mariner, dying in 1749, a bachelor, left a mother and two sisters, living in Scotland. On the 14th of May, 1739, he, with his own hand, filled up the blanks of a printed will, and executed it in the presence of two witnesses ; appointing David Mullo, with whom he then lodged, executor and universal legatee ; in December, 1750, Mullo took probate ; in Michaelmas Term, 1752, the mother cited him to bring

same judge, Sir George Lee, and also from a note in his own handwriting, it appears "that as there was no proof that the will was made to secure a debt; but this rested only in the belief of a witness; and on the contrary it was proved by two witnesses that the deceased, a short time before his death, had expressed a great esteem, regard, and friendship, for Mullo, and said his will and power were there, and that he had made a will in favour of Mullo, and in fact had suffered the will to subsist for above twelve years, though he was often in England, and might have revoked it if he had intended his relations should have his effects, he pronounced for the validity of the will.

In *Douglas v. M'Cumming*, before Sir George Hay, 1773,—the will was also established on similar grounds.

In both these cases, it is to be observed, there was

in the will, and prove it by witnesses. He propounded it, and fully proved the factum of the will; the mother did not plead, but cross-examined the witnesses. William Gillespie, the only surviving testamentary witness, said, he had been witness to a will and power from the deceased to Mullo, and on interrogatories that he believed the deceased's circumstances were not great in May, 1737; that he was then a mate of a ship, but afterwards became a master; that he (the witness) does not know nor ever heard, but believes, the said will was made to secure a debt to Mullo, as the deceased had lodged some time at Mullo's house; and the respondent has heard the deceased say that Mullo was indebted to him. The counsel for the mother admitted the *factum* of the will: but insisted it was void as being made to secure a debt.

From Sir George Lee's Manuscript Notes.

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evidence of affection and regard, and of intention to benefit by will;—and neither the statute nor the decisions meant to make the relation of agent and seaman, nor the circumstance of the seaman being indebted to his agent an absolute defeasance of the will, so that it could, in no case, be valid;—but only so far to alter the *onus probandi* as to require evidence of *intention* beyond the mere act of execution. The law meant to protect the *real* intentions, and not to disable the seaman from disposing according to his real wishes.

In *Lander v. Young*, before Doctor Calvert, 1785, the will was established upon the ground that the proof of the intention was sufficient, and that the testator understood the nature and effect of the instrument, saying, “It should be good if he died.” “If he died, he hoped God would bless him (the executor) with it;” “that he had rather Young (the executor) should have it, than the chest at Chatham;” so that there was direct proof that the testator knew that the instrument was to operate after his death, that it would convey his property to the executor, and that he intended it should have that effect.

In *Forbes v. Burt*, 1789, (*d*) before Sir William

(*d*) *FORBES v. BURT.*

The deceased was quarter-master on board an East India ship; and died, while on service at China, in 1783, leaving a mother and sister his only next of kin. Two wills were propounded:—the one dated the 3d of November, 1759, on board the *Princess of Orange*, by which he gave all his property to his mother for

Wynne, the will was set aside, not on the ground that it was given as a mere security for a debt, for the Court was of opinion that the circumstance was not sufficiently proved;—but upon the ground

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life; and, after her death, to his sister: the other dated the 27th of September, 1770, by which all his property was bequeathed to Andrew Burt, a grocer, at Wapping, who was also the sole executor named in the instrument.

Sir William Scott and Dr. Battine were counsel for Burt.

Dr. Harris and Dr. Nicholl for the mother of the deceased.

The cases cited in argument were *Howson v. Allen*, Michaelmas Term, 1785. *Craig v. Lester*, 1713. *Leake v. Harwood*, 1737. *Anderson v. Ward*, 1749. *Moor v. Smart*, 1756. *Hay v. Mallo*; *Lander v. Young*, 1785. *Brown v. Langley*; *Douglas v. McCallin*, 1763.

JUDGMENT.

Sir WILLIAM WYNNE.

Two wills are propounded of Andrew Forbes: one dated on the 10th of September, 1776, in which Andrew Burt was sole executor and residuary legatee; the other on the 3d of November, 1759, in which Ann Forbes, his mother, is executrix; the effects are left to her for life, and then to his sister.

The will of 1770 is propounded in a *condidit*, with additional articles pleading that the two subscribed witnesses are dead, and their character and handwriting. Three witnesses are produced. Partridge speaks to the handwriting of both, and remembers one of them telling him that he and Scott had attested the will of one Forbes, to oblige Burt. Each of the others prove the handwriting of one of the subscribing witnesses; there are two witnesses then to each of their subscriptions.

There is a second allegation pleading acquaintance from 1769; that he had advanced money to him without interest, particularly 200*l.*;—and that on account of these favours he was in great friendship with the deceased; that he lodged with him, and he exhibits several of his letters; that at several times in 1775, 1778, 1780, and 1782, the deceased signed orders authorizing Burt to receive two months of his pay; that on October 2,

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that the evidence of the *factum* was insufficient to support such a will. The judge said "it is extremely material that it should be proved the deceased knew it was a will, and not a power of at-

1782, just before he sailed on his last voyage, he purchased 500*l.* 3 per cents in the joint name of himself and Burt, and declared it was for the benefit of the survivor ;—that Burt never charged interest or commission, and lent him 45*l.* to make up the purchase. It alleges his handwriting and recognitions of the will, especially in his last illness. When he was asked by a shipmaster to make his will, he said his only friend, Burt, had his will.

Only one witness deposes to the handwriting. She was examined on the 18th of December, 1787 ; and says, that in October, 1782, she once saw the deceased write his name to an order ; and that this was the only time she ever saw the deceased write.

The connection between Burt and the deceased is fully proved. He was received as one of the family ; he always lodged there, and employed Burt as his agent ; two letters are exhibited in 1770, and others in 1771 ; the subject of them was the impressment of the deceased ; and he desires Burt to use his influence to get him off. He expresses his obligations to Burt, says Mr. Hamilton's expense must be great, &c. "and you may be sure of being repaid ; you have laid out five or six guineas ; need be under no apprehension, &c.;" this is written near the time of the will, but there is no mention of it.

The letters of attorney are produced ; it is said by the witness that it is usual to give security at the India House, and for the person who is security to receive two months' pay. There is no proof of the purchase of the 500*l.* 3 per cents, nor is there any proof of the alleged declarations.

The whole evidence then is, that it is proved by two persons acquainted with the witnesses ; that the subscriptions are their handwriting, and that they were men of character, and the declaration of one that he had subscribed, with the other, the will of one Forbes. There is no proof of the handwriting of the deceased, but by one witness who had once seen him write seven

torney ;—there were no recognitions of the act ;—no proof that the instrument was ever in possession of the deceased ;—strong evidence of affection for his mother and sisters, and that he was about mak-

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years before ; this is the only proof of the fact. There is general evidence that there was connection between the parties ; friendship, on the part of the testator, and the employment of him as agent.

It has been asked what is wanting to establish the fact, the witnesses having died. A great deal more might be done : there is no proof that the instructions came from the deceased ; there is no proof that the will was read to or by the deceased. In answer it may be said that the proof would arise from the witnesses who are dead, one of them often employed in writing in the whole business ; it is usual for a will to be read over in the presence of the subscribed witnesses ; it is usual, but it is not always so ; their death does not supply the want of proof. The executor may have taken the instructions himself ; and, therefore, cannot prove it : this is his own fault. There is no proof that the witnesses were unknown to the testator ; it appears rather that they were, from the declaration ; namely, that he had witnessed the will of one Forbes to oblige Burt ;—this is exactly the way in which a man would speak who had witnessed the will of a person whose name he only knew, at the desire of the executor ; and if this is proved by living witnesses,—that he had attested the will of a person whose name was Forbes,—it will not suffice, for it is necessary to establish the identity. Where there is such a connection between the testator and the executor as exists here, such proof is peculiarly necessary. It appears that the will and power were executed in favour of Burt ; it is not impossible that he may have been deceived, being an ignorant man ;—it is necessary to establish by proof, or necessary legal inference, that the party knew what he did and intended it. It is proper to shew declarations ; such have been alleged ; if they are proved, nothing is wanting,—the question could not have arisen ;—but there is no proof of them. The only evidence is that of a woman servant at Burt's, ten or ele-

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ing a will in their favour;—upon the whole that he could not apply the principle of the will being a mere security for a debt, because there was no proof of any debt;—but in the failure of that

ven years ago, who had heard the deceased say, when playing with Burt's children, if he died unmarried what he had should go to them : this does not point to this will.

The finding the will is a question of consequence in such a case ; here there is no proof that it even was in the possession of the testator for one moment.

If this was all, it would be a weak case ; if there is no evidence to substantiate it, the fact is improbable : but here there is very strong proof in aid of the improbability. Burt is a stranger in blood ; he is the executor and residuary legatee. The deceased had near relations, a mother and sister, to whom he shewed every species of affection, which is proved in every possible way. When very young, he made his will (in 1759) in favour of his mother and sister ; the deceased sent it to his mother ; he himself came soon after, read the will, and re-delivered it to his mother ; this is proved by the sister, who has released her interest. Another witness knew Forbes from his childhood ; he always had great affection for his mother ; he corresponded with her, and sent her presents ; he was the only support she had.

Chapman knew him twenty years ; he spoke very affectionately of his mother and sister ; he corresponded with them and sent them money. His sister had not seen him for seventeen years ; but they have not made proof of his want of affection for her. In a letter to Burt, in 1770, he says he is glad he has sent her 10*l.*, and that he shall be ready to pay any thing he has.

Another letter is dated August, 1771, in which he writes “ be so good as to send 10*l.* to my mother, who I suppose stands in need of some supply.” Other letters have been exhibited as written by the deceased : they are alleged to have been written by him ;—Burt says, in his answers, that he does not believe the article to be true : that he does not believe the

clear proof of the *factum* which the circumstances of the case required, he should pronounce against the will."

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letters to be of the handwriting of the deceased. In a subsequent allegation it is pleaded that it had been discovered that the letters were not written by the deceased, but by Burt. In answer to this, he allows that he wrote them; but that the letters were sent without the knowledge of the deceased, who had conceived a disgust at her: but he allows he sent her presents. One of the letters says he has given an order to Burt to send her 10*l.* annually, which is proved by another letter of Burt's. This proves beyond doubt that a connection was kept up with the mother till 1782, his sending her money and presents, and in his last letter is the mention of annual provision.

There is evidence that he was on board ship in his last voyage down to the moment of his death.

Some objection has been raised as to the regularity of the way in which it is introduced and examined so long after the allegation given by the adverse party: but he had just arrived from an East Indian voyage. It is said it is extra-articulate; the articles allege that he was quarter-master on board the Stormont, that he had a mother and sister and affection for them.

One witness says he had great affection for them; that he saw him with a bag of dollars, and that he said he could now settle and make his old mother and his sister comfortable.

Another witness says, that when he was confined to his hammock by illness, he spoke with great affection of his mother and sister, and said that he meant to go and spend his money with them; such expressions of affection he used again at another time. A quarter of an hour before he died he used expressions of regard towards them; said that he meant they should have all; that he had no obligation to any other person. This is all articulate, and there cannot be stronger evidence of affection. This witness goes on to speak of instructions for a will; this, in order to establish such a will would be extra-articulate: but it is consistent as evidence of affection, and it is the strongest

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From these cases the result to be deduced is, that when the relation of agent and seaman exists, there must be clear proof, not only of the subscription of the deceased to the instrument, but also

evidence of this description. It would be strange if general evidence were to be admitted, and such as this rejected.

Robertson says, that a quarter of an hour before his death, he appeared to be anxious that it should be understood that he left his mother and sister every thing, and that he desired the persons there to get him a will immediately, and that all should be left to his mother and sister. The witness desired the officer to draw a will, which he did : but before he could get the deceased to sign it, he died. This is confirmed by another witness.

It is objected that these might be only ravings. One witness, however, says expressly that he was sensible: but he is not examined on such a plea ; that he spoke to facts and circumstances, recollected the names of his relations, desired his property might be given to them, for that he had obligations to no other person ;—there is full proof of his capacity.

It has been argued as to what would be the consequence if this will had been propounded : but it is not necessary for the Court to enquire into that, for it is not before the Court. The evidence is such that it would have been difficult to distinguish it from the cases where instructions have been taken, and the deceased died before execution ; for the probability is that it was written before the deceased died.

Neither is it a consideration for the Court, whether the will of 1770 is good under stat. 9 & 10 W. III. (a). There is no fact to found the law upon.

Under the circumstances *deficit probatio*,—I do not think Burt has brought satisfactory and legal proof that the will of 1770 was executed by the deceased as alleged. The evidence would not amount to it ; and, taking in the infinite improbability of his deserting his mother whom he had supported, it clearly will not suffice.

(a) c. 41. s. 6.

of his knowledge of its nature and effect ;—that wherever it is executed *merely* as a security for a debt, it shall not operate as a testamentary disposition of the whole property ;—but on the other hand,

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I do not, however, think there is evidence to pronounce that there was fraud ; therefore, it is not a case for costs.

In the course of reading the evidence to the Court, the following objection was taken by Sir William Scott to the introduction of some exhibits which had been annexed to interrogatories.

These exhibits are improperly introduced. Sometimes a witness is allowed to exhibit documents of this description on his depositions : but this is dangerous because it is to introduce evidence in a way in which the other party cannot be apprized of it. These exhibits were in the possession of the party herself, and should have been pleaded ; others of exactly the same kind are pleaded in this very cause ; these are brought forward by the witness only on interrogatories, and admitted by the examiner, which is irregular.

*Per Curiam.*

In the interrogatory the witness is directed to produce and annex any writing of the deceased.

Sir WILLIAM SCOTT.

But she is not directed to introduce papers in the possession of the party herself.

*Per Curiam.*

The examination of the witness as to competency cannot be objected to, for she has released. These exhibits are produced in consequence of an injunction in the interrogatories. I do not see how I can prevent the reading of them. What weight it will have in the way of evidence with the Court is a different question. When a paper is brought in in this way, though it may be read, it is not made direct evidence. In *Foster v. Wright* many letters were produced by one of the witnesses. Sir George Hay rescinded the conclusion of

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though there may be a debt, yet if there be satisfactory evidence that the testator intended to dispose of his property by will ;—the instrument shall be valid.

Applying these principles to the facts of the present case ;—the evidence by no means establishes, to my mind, that the deceased knew he was executing a will, having the effect and operation of giving his whole fortune to Zacharias in exclusion of his family. The evidence on the other hand satisfies me that whatever instrument the deceased supposed himself to be executing, it was merely in consequence of the money advances made to him by Zacharias, and not with a view to testamentary benefit ;—and that when he had paid the debt, and taken his papers out of Zacharias's hands, he did not entertain any impression that Zacharias had a further claim upon, or would derive any benefit from, his property after his death. I am, therefore, of opinion that the *factum*, in the sense already given to that term, is not proved ;—considering further that Zacharias, when required by the deceased to deliver up all his papers, declared that he had done so ;—and, after a pretended search, repeated the declaration that he had not a single paper belonging to the deceased in his possession ; yet fraudulently retained this instrument, which the deceased himself never saw except at the moment of signing it, under the circumstances already mentioned, I should feel great difficulty in

the cause to allow them to be pleaded, stating that the other was not the proper way of introducing papers on which the cause might turn.

holding the executor an universal legatee entitled to take advantage of his own fraud by obtaining probate of this will. Upon the whole, I feel bound to pronounce against this will:—but as Mr. Zacharias is now dead, and his representatives were not privy to the transaction, I shall give no costs.

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## HIGH COURT OF DELEGATES.

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BRISCO v. BRISCO.

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*An appeal from the Arches Court of Canterbury.*

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**T**HE Judges' Delegates who sate under this commission were,—

Mr. Justice Burrough.

Mr. Baron Garrow.

Mr. Justice Best.

Dr. Daubeny.

Dr. Gostling.

Dr. Dodson.

Dr. Meyrick.

and

Dr. Jesse Addams.

This cause originated in the Consistory Court of London, in Hilary Term, 1814, by a citation taken out by Lady Brisco against her husband, Sir Wastel Brisco, in a cause for cruelty and adultery.—A libel was given in by her, which was met by a recriminatory plea on the part of



the husband, she, in her turn, gave in an allegation responsive to the recriminatory plea. On these several pleas a great number of witnesses were examined.

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On the 28th of May, 1817, publication of the depositions was decreed. An allegation was then given in on each side exceptive to the testimony of several of the witnesses;—the allegation of the husband was admitted.—But the judge of the Consistory Court rejected nine articles of Lady Brisco's exceptive plea, and directed two others to be reformed. From this sentence Lady Brisco interposed an appeal to the Arches Court of Canterbury on the 17th of April, 1818: but the inhibition was not returned till the 28th of November of the same year. On the 20th of May, 1819, a question arose in the Arches Court concerning alimony;—the Consistory Court had, in Hilary Term, 1816, allotted 200*l. per annum* to Lady Brisco in addition to the sum of 200*l. per annum* to which she was entitled for pin-money. It was prayed, on the behalf of the husband, that alimony in the Arches Court should be allotted from the date of the inhibition, and not from the date of the sentence: but the Court decreed that it should be computed from the date of the sentence.—From this decision Sir Wastel Brisco appealed to the Delegates.

*Dr. Phillimore and Dr. Lushington for Sir Wastel Brisco,*

Cited the case of *Gresse v. Gresse*, (a) and the judgment in *Loveden v. Loveden*, (b) to shew that

(a) Vol. I. p. 210;

(b) Vol. I. p. 208.

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it was in the discretion of the Superior Court to allot alimony either from the date of the sentence, or from the return of the inhibition; and contended that the delay which appeared on the face of the proceedings in the prosecution of the appeal by Lady Brisco fully justified their praying it to decree the allotment of alimony, in the present instance, from the return of the inhibition.

*Dr. Arnold and Dr. Jenner* were proceeding to reply on the behalf of Lady Brisco, when they were stopped by the Court, who intimated their opinion that the alimony should be paid from the date of the sentence in the Consistory Court.

*Per Curiam* (Mr. Justice Burrough.)

Is there any instance where both parties, as they do in the present instance, have prayed this Court to retain a cause when it would be remitted to the Inferior Court.

*Dr. Arnold.*

It is quite discretionary with the Court; it is sometimes prayed, as now, to avoid delay and expense.

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The sentence of the Arches Court of Canterbury was affirmed; and the Court retained the principal cause.

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## PREROGATIVE COURT OF CANTERBURY.

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Term,  
Feb. 14.

STRAUSS v. SCHMIDT.

**I**N June, 1788, George Lewis Hansen being at Liverpool, and on the point of leaving England, for the continent of Europe, delivered a sealed paper to Messrs. Heywood and Co., merchants, in that town, in whose hands he had upwards of 2,000*l.* at interest, with directions to them to open it as soon as they should hear of his death.

A recognition establishes testamentary papers which were conditional in their terms:—testamentary effect given to three letters.

The letter was as follows :

Messrs. Heywood, Son, & Co.

Liverpool, 21st June, 1788.

Gentlemen,

In case I should die on my travels, I request the favour of you to remit my money which I have in your bank to Messrs. C. F. Hansen, I. C. Bangi, and G. G. Strauss, at Zinna, near Berlin ; or to deliver it to Mr. John Blackburne, of this place, whom I have requested to-day, in a sealed letter, to remit the money to my said three friends at Zinna,

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at such a time as the exchange will be favourable to the three gentlemen which Mr. Blackburne has promised me to do.—I hope, from your kindness, that you will, in this affair, conjointly with Mr. Blackburne, do for the best.

I have now in your bank 218*l.* 18*s.* 6*d.* sterling; and shall soon send to you, or to Mr. J. Denison, in London, 2 to 300*l.* more.

Of all this I give the necessary information to the above mentioned three friends in Zinna.—In case I should die, I humbly request you to acquaint the three gentlemen with my said will, in the German language, as they do not understand English. Your letters you may address only to one, *viz.* Mr. C. F. Hansen, at Zinna, per Berlin.

I recommend my friends to your kind remembrance; and am, with great respect, your most humble servant,

G. L. HANSEN.

On the first of July, 1788, he addressed the following letter (*a*) to Mr. I. C. Bangi, at Zinna.

My dear beloved Bangi,

How much I shall be able to write to you to-day I cannot at this moment ascertain.

If you know what offensive letters my brother

(*u*) This letter was not to be found. Mr. Benson had lost it: but he had a distinct recollection of the most important passages it contained. A draft of it, which had been found amongst the deceased's papers after his death, was pronounced.

wrote to me sometime ago, you may easily imagine that I was very angry on account of it.—My displeasure is so great that I have grown grey and old since ;—my digestion is very bad ;—I am no more in good health nor gay.—The most clever physicians of Liverpool tell me that nothing but a sea sickness can cure me. I have, therefore, taken the resolution to go to France to try if I can be sea-sick, and whether I am able to forget this shameful offence among the merry Frenchmen, and whether I can be easy again in my heart. I got to London a few days ago. All physicians whom I know here are of the same opinion as those of Liverpool, that I can only be saved by a sea-sickness ;—therefore, as I may easily die, I think it to be my duty to write to you from here to inform you what you have to do with my property in case I should die. The cash I have at present in the Bank of Messrs. Arthur Heywood, Son, and Co. of Liverpool amounts to 2182*l.* 18*s.* 6*d.* of which I shall probably take out 206*l.* 9*s.*—so that 1976*l.* 9*s.* 6*d.* remain in their Bank. I shall shortly remit from France and from Flanders 270*l.* to 300*l.* sterling, which sum I do not exactly know : but you may calculate that I have 2270*l.* to 2280*l.* in the before mentioned bank of Liverpool.—Besides I have to receive of Mr. Lebins, at Newfarwasser, 190*l.* to 200*l.* ; further, of Mr. Gene, at Stettin 15*l.* or 16*l.*, both amounts I cannot exactly say, as I forgot to look over the accounts in Liverpool ; it is, however, nearly as much either a little more or less. Should I die, and these

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amounts have not been paid, you have to receive them of the above mentioned two gentlemen. Mr. Gene is inspector, and Mr. Lebins bookkeeper, both of the Maritime Trade Company. Should I live another year, I am to receive from 200*l.* to 250*l.* of Mr. J. Blackburne, in which case you will receive, in June, 1789, 2690*l.* 2700*l.* Moreover, there are in Liverpool, at Mr. Blackburne's, a bathing machine, three trunks, and three large chests, with clothes, linen, &c. Echaratt, and others, also owe me a little. Mr. Peel knows how much it is; and I wish you would receive it. All my money, things, and whatever I may possess, I leave to you and my brother's children, in equal shares, in case I die. Probably you know that one pound sterling makes 6½*Rf.* to 6*Rf.* 1½*ggr.* Berlin currency. Messrs. Heywood understand the German language; they were at an academy at Hambro'; you may write to them in German. Mr. Blackburne is my particular friend, a very worthy Englishman. He does not know German; his letters may be translated to you by Mr. Zollner, or others. I left sealed letters to the care of Messrs. Heywood and Blackburne, which they are not to open till I am dead. In them I order to transmit my money and effects to Mr. C. F. H., I. C. B. and G. G. Strauss; namely, to Mr. Martin Dormer, Hamburgh, by Mr. Blackburne's vessel. Mr. Dormer is Mayor of Hambro'. You may refer to this in your letters to Liverpool and Hambro'. You will be pleased to direct the letters as follows:—

Arthur Heywood, Son, and Co., Esquires, per  
Amsterdam, Liverpool.

John Blackburne, Esquire, Liverpool.

Mr. Martin Dormer, in Hamburg.

Exactly so, my dear Bangi, Messrs. Messrs. and all titles are quite left out in English letters ;—you neither say Sir when you write in German. In my sealed letter I requested the gentlemen to send you my money at such a time when the exchange is in your favour, by which Mr. Heywood gains nothing ; but you do. The money is sent in bills for which any banker in Hambro', Berlin, Leipzig, &c. will readily pay you cash. Heywood and Co. are very safe and good people ; you may, therefore, leave the money with them for years, and as long as you please, as the interest increases the capital. Of the above 218*l.* 18*s.* 6*d.* I have not received the interest. From this year Messrs. Heywood must pay you 5 per cent. interest.

On my journey to Northwick, Liverpool, &c. I lost 4 to 500 ducats, in case they are not at the bottom of my trunk ; I have not examined it particularly. If you find them, so much the better. You, therefore, must request Mr. Blackburne to get all trunks, chests, &c. well corded and sealed. You take care of the needful in the Prussian dominions about opening, putting leads to it, &c. I think I have written the necessary to you now.

I had gained considerably three years ago : but I lost a great part by chicaneries with which I was not sufficiently acquainted. I shall write to you

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from France or Flanders, if I live. I leave London in a few days. If I do not get sea-sick on the short voyage, I shall not go to sea.

It is already late : my best respects to you and all our friends, and I shall never cease to be your true friend.

In September, 1800, the deceased returned from the continent ; and took up his residence in the neighbourhood of London, where he continued till death.

On the 29th of April, 1816, he wrote a letter to F. W. Strauss, the son of G. G. Strauss, from which the following is an extract : (a)

“ How would you and Bangi have acted respecting my property in England, and at Luckenwaldi, if I had died, or should now be soon dying ? Do not think slightly of this case ; and do not depend upon the honesty of the English, in particular upon that of the merchants, bankers, brokers, &c. ; and in case you should fall in the hands of the English lawyers, you must expect to receive nothing.

Bangi never thought it worth his while to speak to me on the subject ;—hardly a few words ;—never proposing how and in what manner I could place my money more securely, and to advantage, in your country, either at 5, 6, 7, per cent interest, or in adventures, &c. He never troubled him-

(a) The remaining part of the letter was wholly of a private nature.



self about it. Last year I named to him an amount. I suppose he never took the trouble to calculate that I must be possessed of much more money than what I had stated, as he knew that I never drew the interest ; but had it added every year to the capital, by which means the same is doubled in fourteen years and a quarter.

*In England all property left without a will, signed by three witnesses, belongs to the king. I have not made a will ; for this is even expensive. Mr. H. has in his possession a sealed letter dated in the year 1788, when I left Liverpool ; and in which I wrote him that my brother and Bangi shall have my money in case I should die.*

When my brother died, I informed him that Bangi and your father should receive my money from him. I have not communicated to him yet the death of your father. Bangi is seventy-two, and I am seventy years of age. Consider how precarious, how uncertain, we stand. I always hoped Bangi, or my brother, or your father, would have told, or written to me, every particular circumstance, how and in what manner I could place my money securely in your country ; but no. This appeared to me strange, and made me indifferent."

The deceased died in November, 1818, leaving Charlotte Louisa Bangi, his sister, and a niece, the daughter of his brother, C. F. Hansen, who would have been entitled to distribute his personal property if he had died intestate. His personal estate consisted of 3,228*l.* in the hands of Messrs. Hey-

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wood, Son, and Co.; and of property elsewhere amounting to 623*l*.

The three letters together with an English translation of them, for the originals were written in German, were propounded in an allegation, as containing together the last will of the deceased, by Johanna Frederica Strauss, widow, the daughter of John Christian Bangi; and, as such, one of the universal legatees under the said testamentary instrument.

*Burnaby and Lushington against the admission of the allegation.*

*Jenner in support of it.*

JUDGMENT.

SIR JOHN NICHOLL

This case very much depends on the construction of the papers.—The deceased was a German, who had resided fourteen years in England. In 1788, he wrote two of the papers propounded, and then went abroad in search of health;—he writes to a house at Liverpool, in case of his death, to send his money to Germany;—he had money in their hands;—he was not only a foreigner, but he was ignorant of our laws;—his expressions, therefore, are not to be construed too strictly;—the Court is to look as much as possible to the intention;—the first letter is dated from Liverpool, in 1788. It is addressed to Messrs. Heywood, Son, and Co, his agents, there;—and requests them, in case of his dying on his travels, to remit the money he has in their Bank to Messrs. C. F. Hansen, I. C. Bangi, and G. G. Strauss, at Zinna, near Berlin.

In another part, after stating the amount of the money, he proceeds :—" Of all this I give the necessary information to the abovementioned three friends in Zinna.—In case I should die, I humbly request to acquaint the three gentlemen with my said letter in the German language, as they do not understand English."

A few days afterwards he comes to London, and arranges what he clearly intends to be a disposition of his property ;—his object is to get his money sent out of England. " All my money, things, and whatever I may possess, I leave to you and my brother's children, in equal shares, in case I die ;" and in which part he says, " I left sealed letters to the care of Messrs. Heywood and Blackburne, which they are not to open till I am dead."

These two papers together are admitted to be testamentary papers, which would have operated had his death taken place during his absence from England ;—he was fourteen years absent.

Courts, however, are cautious how they construe conditions of this sort. I have looked whether it is an absolute condition, or dependent on any particular motive operating at the time. It does not say it is to take place only in the event of his dying :—if on the return of the deceased in 1802, by subsequent acts he has recognized these papers, I should not hold his return to be such a defeasance as to invalidate the will.—If he had returned, and taken no notice of the paper, his silence would have put a construction on it ;—if, on the other hand, his conduct shews that he was mindful of

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it, the Court is bound to carry his intentions into effect.

The case turns on the construction of No. 3. : it is dated in April, 1816;—it is addressed not to one of the three persons to whom the money was to be remitted, for events had changed;—two of them were dead;—the third had become advanced in life;—he writes to his great nephew, directing and informing him, and there are passages which shew that he considered the papers as conveying directions respecting his property, especially No. 1. and No. 2. mixed up with No. 1. The parties who were to inherit were not dead. “How would you and Bangi have acted respecting my property in England, and at Luckenwaldi, if I had died, or should now be soon dying? Do not think slightly of this case; and do not depend upon the honesty of the English, in particular upon that of the merchants, bankers, brokers, &c.; and in case you should fall in the hands of the English lawyers, you must expect to receive nothing.”

It is said this shews the loose way in which he expresses himself;—and so it does:—but these are the parts which more expressly recognize them.

“In England all property left without a will, signed by three witnesses, belongs to the king;—I have not made a will, for this even is expensive. Mr. H. has in his possession a sealed letter dated in the year 1788, when I left Liverpool, and in which I wrote him that my brother and Bangi shall have my money in case I should die.”

This is a direct recognition of the existence of a letter which was not to be opened till after his

death ;—he goes on recognizing this direction ;—he keeps the disposition alive. “ I have not communicated to him yet the death of your father.”

I think the deceased did not consider his return to this country as a revocation.—These circumstances shew that he regarded these letters as important,—which were to direct the disposition of his property ;—and, therefore, I think the Court is warranted in admitting this allegation to proof.

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*Hilary*  
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SALMON and Others v. CROMWELL.

Admission of  
an exceptive  
allegation  
suspended.

## JUDGMENT.

SIR JOHN NICHOLL.

The Court at all times admits exceptive allegations with caution, and they are seldom introduced with effect.—This case is not a favourable one for an exceptive plea.

The question at issue is, whether an interlineation was or was not inserted by the deceased himself;—the part interlined conveys, to the benefit of Mary Cromwell, from 20,000 to 30,000*l.*—An immense mass of evidence has been produced;—the witnesses excepted against are not examined to the interlineation which is the main point in the cause;—but merely to a general conversation from which some inference may possibly be drawn;—but which bears but distantly on the main fact.—Where the main fact depends on the evidence of some particular witness, and it is necessary to weigh the credit of that witness nicely, the Court is less averse to admitting an exceptive allegation.

If the Court could not get at a satisfactory conclusion, but by nicely examining the credit due to these witnesses, there would be little hope of any satisfactory conclusion.—Added to this, they have already undergone a pretty long examination;—and I shall be very well able to estimate the degree

of credit to which they are entitled.—What is the sort of exception? They are asked whether they made certain declarations, and they say “No.” This is all that is alleged to affect their credit;—and it really would go a very short way;—if the witness herself should not recollect her declarations, it would but slightly affect her credit;—but still less so would it affect that of one who speaks to so remote a fact;—it is hardly justice to the party to allow such an expense to be undertaken;—and this observation applies more forcibly to the second witness;—so slight a circumstance will not justify me in admitting this libel.—What I propose to do is, to let the cause go on;—and if I find this testimony material to the issue, I will then consider whether I will not rescind the conclusion of the cause to allow the witnesses to be examined on this exceptive plea;—and I wish the counsel to argue upon it, *de bene esse*, if they think they can derive any benefit from it.

1820.  
*Hilary*  
*Term.*

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SALMON  
J.  
CROMWELL.

1890.  
Hilary  
Term,  
Feb. 23.

GILLIAT v. GILLIAT and HATFIELD.

Probate not  
necessary for  
a will ap-  
pointing tes-  
tamentary  
guardians.

**PER CURIAM.**

From the decisions which have taken place it is quite clear that it is not necessary that a will appointing testamentary guardians should be proved in this Court.

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## ARCHES COURT OF CANTERBURY.

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 PARHAM v. TEMPLAR.
 

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*An Appeal from the Peculiar Jurisdiction of the  
Dean and Chapter of Exeter.*

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1820.  
Easter  
Term,  
May 8.

**ARTICLES** were exhibited in the Court of the Dean and Chapter of Exeter, by Benjamin Parham, of Ashburton, in the county of Devon, against the Reverend John Templar, Curate of the parish, for altering a pew in the nave of the church. The Court decided that John Templar had, improperly and without due authority, divided the seat in question ;—enjoined him to restore it to its former situation, and to certify the same within two months ;—but it declared that the seat, when so restored, would not be the exclusive property, or belong solely to the family of the Dolbeares under whom the plaintiff claimed either by possession from time immemorial or otherwise ;—but that the same might be

An appeal from the Dean and Chapter of Exeter cites to the Court of Arches, and not to the Consistory Court of Exeter.

1820.  
Easter  
Term.



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v.  
TEMPLAR.

allotted to the plaintiff, and his family ;—and also, part thereof assigned to any other family or persons.”

Each party litigant thought themselves aggrieved by this sentence. Templar appealed to the Consistory Court of Exeter, whereas Parham brought his appeal into the Court of Arches ; there the adverse party appeared under protest. and contested the jurisdiction ; and the following act on petition was entered into by both parties.

“ Christian exhibited as proctor, and made himself a party for the Reverend John Templar, the party cited ;—but, nevertheless, under protestation to the jurisdiction of the Arches Court of Canterbury, in this behalf, and with all due deference alleged that this is a business of appeal and complaint of nullity, as asserted, promoted, and brought, by Benjamin Parham, of the parish of Ashburton, in the county of Devon, within the peculiar jurisdiction of the Dean and Chapter of the Cathedral Church of Saint Peter, in Exeter, and within the diocese of Exeter, as the party appellant and complainant against his said party the Reverend John Templar, Clerk, the Curate or Officiating Minister of the aforesaid parish of Ashburton, as the party appellant, which was originally a certain cause of the office of the judge, and lately depending in the Peculiar Court of the Venerable the Dean and Chapter of the Cathedral Church of Saint Peter, in Exeter, at the promotion of the said Benjamin Parham against the said Reverend John Templar, clerk, touching and concerning his soul’s health, and the lawful correction and reforma-

tion of his manners and excesses, and more particularly for his having (as it was alleged) altered a certain seat or pew in the nave or body of the church of Ashburton aforesaid, of and belonging to the said Benjamin Parham, whereby he had caused to be reduced and taken away from the length thereof two feet ten inches or thereabouts, and from the width four feet one inch and a half or thereabouts, without the licence or faculty of the ordinary or other lawful authority whatever, from a certain interlocutory decree, whereby the Worshipful and Reverend James Carrington, Clerk, Bachelor of Laws, Official or Surrogate of the Venerable the Dean and Chapter of the said Cathedral Church, did, on the 19th day of March last past, amongst other things pronounce that the said John Templer had, improperly and without due authority, divided the seat in question; and that he, therefore, be enjoined to restore it to its former situation, and to certify the same within the space of two months from the date of such decree. But further declare that the pew in question in the said cause was not the exclusive property, or belonging solely to the family of the Dolbears, under whom the plaintiff claimed either by possession from time immemorial or otherwise; but that the same may be allotted to the plaintiff and his family, and also a part thereof assigned to any other family or persons for the better accommodation of the parishioners, at the discretion of the churchwardens; and did moreover order and decree that each party should pay and

1820.

*Easter**Term.*


PARHAM

v.

TEMPLER.

1820.  
Easter  
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PARHAM  
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TEMPLER.

discharge his own costs. Now the said Christian alleged, and humbly submitted, that from the said interlocutory decree or judgment it is on behalf of the said Benjamin Parham unduly appealed to this Court, inasmuch as the right of appeal in the first instance from the jurisdiction of the said Court of the Dean and Chapter of the Cathedral Church in Saint Peter's, in Exeter, as well in all causes *ad instantiam partis* as *ex officio* notoriously belongs to the Lord Bishop of the Diocese of Exeter, or his Chancellor or officer for the time being, and does not lay directly to the Arches Court of Canterbury, and to the Right Honourable the Official Principal thereof, and has so belonged to the said diocesan court by ancient and immemorial usage; and further alleged that in and by a certain instrument in writing, purporting to contain a composition or agreement made and entered into on or about the first day of May, in the year of our Lord 1616, and registered in the books of the said Dean and Chapter, between the Right Reverend William, by God's Providence, Lord Bishop of Exeter; Barnaby Gooche, Doctor of Laws, Chancellor to the said Lord Bishop; The Dean and Chapter of the said Cathedral Church of Saint Peter's, in Exeter; Matthew Sutcliffe, Dean of the said Cathedral Church; Thomas Barrett, Archdeacon of Exeter; William Hutchinson, Archdeacon of Cornwall; William Parker, Archdeacon of Totton; William Hellyer, Archdeacon of Barum; and the Custos and College of Vicars Choral of the said Cathedral Church; it is recited

that whereas there had been theretofore and then was divers questions moved between the said parties touching the execution of the ecclesiastical jurisdiction within the said diocese of Exeter for clearing of which said questions and for the settling and establishing of a peace and certainty therein for ever thereafter between the said parties and their successors, it was thereby concluded, agreed, manifested, and declared, by and between the said parties, for them and their successors, upon search, view, and due examination, of divers instruments, evidences, and records, remaining in the several registries and custodies of the said parties, that the execution of the said ecclesiastical jurisdiction of the said parties shall be bounded, limited, and for ever thereafter used and exercised by the said parties and their successors, and his, their and every of their officer and officers within their several jurisdictions respectively, in manner and form as is therein expressed and declared. And the said Christian further alleged that ~~it was~~ and is amongst other things therein expressed, declared, and provided in the words, or to the effect following: "That the said bishop likewise, or his chancellor, shall hear and determine all causes as well *ad instantiam partis* as *ex officio* brought unto him or them by way of appeal, complaint, negligence, recusation, or provocation from the said Archdeacons, Dean and Chapter, Dean and Custos, and College, or any of them." And the said Christian brought into and left in the registry an official copy of the said com-

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Easter  
Term.

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v.  
TEMPLER.

1820.  
*Easter  
Term.*

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TEMPLER.

position or agreement which he alleged to have been duly examined with the register book of the said Dean and Chapter, and to agree therewith, and to be signed by Ralph Barnes, Chapter Clerk and Notary Public, as a true copy thereof. And the said Christian lastly prayed that by reason of the premises the Right Honourable the Judge would pronounce in favour of the protestation by him made and interposed in this behalf to relax the inhibition heretofore issued at the prayer of the proctor of the said Benjamin Parham, and to dismiss the Reverend John Templer, his said party, from the said pretended cause or business of appeal with costs. In the presence of Bush who exhibited as proctor for the said Benjamin Parham dissenting and denying the allegation of Christian in great part to be true, and alleging that the right of appeal from any decree or sentence of any Dean and Chapter exercising peculiar jurisdiction, or their Commissaries or Officials within the province of Canterbury, does by law and ancient and immemorial custom lay in the first instance to this Court and to the Official Principal thereof, and not to any intermediate or inferior judge; that the Dean and Chapter of the Cathedral Church of Saint Peter, in Exeter, and their predecessors, have for time immemorial exercised and do still exercise ecclesiastical jurisdiction within and over the whole parish of Ashburton aforesaid, and divers other parishes in the counties of Cornwall and Devon; that the same is a peculiar jurisdiction, and is exempt from the Lord Bishop of the

Diocese of Exeter and his Vicar General and Official Principal; that the said parish of Ashburton and the other parishes within the said peculiar jurisdiction have, for time immemorial, been exempt from the visitation of the Bishop of the Diocese of Exeter, and are not visited by him nor by any person exercising ecclesiastical authority under him. And he further alleged that it does not appear that the pretended composition or agreement mentioned and referred to by Christian was ever executed by the persons who are therein mentioned and described as parties thereto; and the said Bush humbly submitted to the law and judgment of the Court that if the same ever was duly executed by the said parties, yet that it is invalid, so far at least as in any way relates to the right of appeal from the peculiar jurisdiction of the said Dean and Chapter of the Cathedral Church of Saint Peter in Exeter, to this Court; and that the right of such appeal could not be altered or in any manner affected thereby. Wherefore the said Bush prayed the Right Honourable the Judge of this Court to overrule the protest of the said Christian; and to assign him to appear absolutely for the said John Templer, and to condemn the said Christian's party in costs.

Christian dissenting and alleging that whatever may be the law or practice as to the right of appeal from any decree or sentence of any Dean and Chapter exercising peculiar and exempt jurisdiction by their commissaries or officials within the province of Canterbury, appertaining in the first

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Term.  
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v.  
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*Easter*  
*Term.*  
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TEMPLER.

instance to this Court and to the Official Principal thereof, and not to any intermediate or inferior judge, such usage would not, as he humbly submitted, be founded in any case in which the jurisdiction of the Court appealed from was not both peculiar and exempt; and he further alleged that the jurisdiction of the said Dean and Chapter of the Cathedral Church of Saint Peter, in Exeter, is exempted only from that of the Lord Bishop of the Diocese as ordinary, and his Vicar General and Official Principal, in those instances which are mentioned and declared in the aforesaid composition or agreement, and no other which was not so entered into as before alleged without diligent search, view, and due examination of the instruments, evidences, and records, remaining in the several registries or custodies of the parties thereto respectively, nor the entry of the said composition or agreement made in the register book of the said Dean and Chapter of Exeter without the original having been duly executed by the several persons who are therein described as parties thereto. And he further alleged that the jurisdiction of the bishop of the said diocese or ordinary has never been parted with except in the particulars set forth in the said agreement: but has been constantly and immemorially exercised by the said Bishop or his Vicar General and Official Principal to whom the same by law and practice (as he further submitted) does in the first instance exclusively appertain in all cases of appeal from the decrees and sentences of the Peculiar Court of the said Dean and Chap-



ter, as also solely and without any concurrence in all matters of ecclesiastical cognizance not formerly declared to belong to the said peculiar jurisdiction in and by the agreement or composition before referred to. Wherefore he prayed the inhibition of Bush to be rejected, and as before.

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*Swabey for Mr. Templer.*

It is not true universally, as stated, that the appeals from all Deans and Chapters within the Province of Canterbury are to the Court of Arches; in the Royal Peculiars they go to the Court of Delegates. By the Civil Law appeals go to the next Superior Court. The (a) Statute of Appeals gives the course of appeals;—if there is any difference in the Canon Law, this statute controuls it.

*Per Curiam.*

Is the Dean and Chapter mentioned there?

*Swabey.*

Certainly not:—but the Archdeacon is. No usage is alleged in this Peculiar;—and the statute is not intended to vary the course of the Canon Law, further than is expressed by the Council of Clarendon 1104. temp. Hen: 2. The appeal is from the Archdeacon to the bishop, *et aliis inferioribus praelatis*. X. 1. 4. 2. Gibson 1036. I take the jurisdiction of the Dean and Chapter to be derived from the bishop;—then, if there is no composition or custom, the right of the bishop remains. Stillingfleet (b) is to the same effect.

(a) 24 H. VIII. c. 12.

(b) Ecclesiastical Cases, 346.

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But the (c) composition of 1616 leaves no doubt. It is stated to have been made on a search into all the evidence in the custody of all the parties to determine for the future the jurisdiction between

(c) The following is a copy of the Composition :—

To all Christian people to whom this present writing shall come,

William, by God's providence, Lord Bishop of Exeter; Barnaby Gooche, Doctor of Law, Chancellor to the said Lord Bishop; The Dean and Chapter of the Cathedral Church of Saint Petter, in Exeter aforesaid; Matthew Sutcliffe, Dean of the said Cathedral Church; Thomas Barrett, Archdeacon of Exeter; William Hutchinson, Archdeacon of Cornwall; William Parker, Archdeacon of Totton; William Hellyer, Archdeacon of Barum; and The Custos and College of Vicars Choral of the said Cathedral Church, send greeting, in our Lord God everlasting: Whereas there have been heretofore, and now are, divers questions moved between the said parties touching the execution of ecclesiastical jurisdiction within the diocese of Exeter aforesaid, for clearing of which said questions, and for the settling and establishing of a peace and certainty therein for ever hereafter between the said parties and their successors. Now know ye that it is concluded, agreed, manifested, and declared, by and between the said parties for them and their successors, (upon search, view, and due examination, of divers instruments, evidences, and records, remaining in the several registries or custodies of the said parties) that the execution of the said ecclesiastical jurisdiction of the said parties to these presents shall be bounded, limited, and for ever hereafter used and exercised by the said parties and their successors, and his, their, and every of their officer and officers within their several jurisdictions respectively in manner and form following:—First, that the said Dean and Chapter, their successors and officers, shall for ever hereafter solely and without any concurrence prove (in common form) all testaments (except the testaments of knights, beneficed men, and such as are *de robâ Episcopis*) and grant letters of administration of the goods of all

the Bishop and his Chancellor on the first part ;— the Dean and Chapter of Exeter and the Dean on the second ;—the Archdeacons on the third ;—and the Custos and Vicars Choral on the fourth. The

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parties deceased (except knights, beneficed men, and such as are *de robâ Episcopî*) within all their several peculiars within the said diocese (*viz.*) Colyton, Shute, Muncion, Braunscombe, Sidbury, Salcombe, Culmestock, Topsham, Heavetree, Clithornyton, Stoake Cannon, Littleham, Ide, Dawlish, East Teignmouth, St. Mary Church, Kingskerswell, Coffinswell, Staverton, Ashburton, Bickington, Buckland, Norton, and Colebrooke, within the county of Devon ; and St. Winnowe, St. Nectan, Bradock, Boconnock, Pieran in Zable', and St. Agnes, within the county of Cornwall ; and also solely and without any concurrence hear and determine within their said several peculiars all causes as well *ad instantiam partis* as *ex officio*.

Secondly, that the said Matthew Sutcliffe, Dean of the said Cathedral Church, and his successors, and his and their officer and officers, shall for ever hereafter, solely and without any concurrence, prove in common form all testaments (except before excepted) within the parish of Braunton, in the said county of Devon, and the Close of the said Cathedral Church of Saint Peter, in Exeter ; and also, solely and without any concurrence, hear and determine within the said parish of Braunton and Close aforesaid all causes as well *ad instantiam partis* as *ex officio*. Thirdly, that the said Custos and College of Vicars Choral and their successors, and their officer and officers, shall for ever hereafter solely and without any concurrence prove (in common form) all testaments (except before excepted) and grant letters of administration of the goods of all parties deceased, (except before excepted) within the parish of Woodbury, within the said county of Devon ; and also, solely and without any concurrence, hear and determine within the said parish of Woodbury all causes as well *ad instantiam partis* as *ex officio*. Fourthly, that the said Thomas Barrett and his successors, within the said archdeaconry of Exon, and his and their of-

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Dean and Chapter without concurrence grant probates, administrations, except of the rights, &c.. and within their Peculiar hear and determine without concurrence all causes *ad instantiam partis*.

ficer and officers (*salvo semper jure Decani*). And the said William Hutchinson, and his successors, within the said archdeaconry of Cornwall, and his and their officer and officers; and the said William Parker, and his successors, within the said archdeaconry of Totten, and his and their officer and officers; and the said William Hellyer, and his successors, within the said archdeaconry of Barum, and his and their officer and officers; shall for ever hereafter, solely and without any concurrence, within their said several archdeaconries respectively, prove (in common form) all testaments (except the testaments of knights, beneficed men, and such as are *de robâ Episcopi*) and grant letters of administration of the goods of all parties deceased (except of knights, beneficed men, and such as are *de robâ Episcopi*) and have and shall have concurrent power with the bishop to hear and determine all causes as well *ad instantiam partis* as *ex officio*, within their said several archdeaconries, respectively. Fifthly, that the said Lord Bishop, and his successors, and his and their Chancellor for the time being, or any of them, shall and may for ever hereafter, solely and without any concurrence, at his or their will and pleasure within all the peculiars of the said bishop, *viz.* Crediton, Sandford, Kennerleigh, Morchard Epi., Nymett Epi., Tawton Epi., Sambridge, Landkey, Chudleigh, Teington Epi., West Teignmouth, Pain-ton, Marledon, Stoak Gabriel, within the county of Devon. And Lezant, Lanhitton, South Petherwin, Treveane, Larack, St. En, St. Germans, Egloskille, Breock, St. Ervin, Padstow in dune, Merdin, St. Issie, St. Eavall, Petrock parva, St. Gerance, Anthony in Roseland, Gluvias, Bodoek, Miler, Mabe *alias* Larape, within the county of Cornwall aforesaid, use and exercise all manner of jurisdiction whatsoever; and within the residue of the said diocese the bishop or his chancellor, solely and without concurrence, shall have power to

So the Dean was likewise ; so the Archdeacons as to probate of wills, &c. and hear and determine with concurrence. The Bishop and Chancellor solely and without concurrence exercise all juris-

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dispense in all causes to grant all manner of licences, sequestrations, and relaxations, and generally to do whatsoever is not formerly declared to belong to the said Archdeacons, Dean and Chapter, Dean and Custos and College, or to some of them as aforesaid. The said bishop likewise or his chancellor shall hear and determine all causes as well *ad instantiam partis* as *ex officio*, brought unto him or them by way of appeal, complaint, negligence, recusation, or provocation, from the said Archdeacons, Dean and Chapter, Dean and Custos or College, or any of them. Lastly, that the said bishop, his or their chancellor or officers for the time being, shall and may for ever hereafter, once in every three years complete, visit all the said dioceses (except the peculiars of the said Dean and Chapter, Dean and Custos and College of Vicars' and their successors) and during the time of such visitation (which shall not be held at any time in Easter week or in the week next before Easter) the said bishop, his successors, his or their chancellor or other officers for the time being, shall or may prohibit the said several archdeacons and their successors from doing and attempting any thing in prejudice of such visitation, during the time of such visitation which shall be for the time of two months and no longer ; the said two months to be accounted from the time of execution of such inhibition upon the said several archdeacons respectively ; and during the said two months the jurisdictions of the said archdeacons shall wholly cease, and the same be exercised by the said bishop or his chancellor in all things saving in such causes whereof they the said archdeacons were possessed before the execution of the said inhibition ; and that after the end of the said two months the said archdeacons and their successors shall and may resume and exercise their several jurisdictions respectively without any relaxation or other leave whatsoever. In witness whereof the said parties have hereunto

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dictions within the peculiars, and throughout the diocese, and grant all faculties.

*Per Curiam,*

Does the Bishop visit within the jurisdiction of the Dean and Chapter?

*Swabey,*

No, the Bishop does not visit there.

*Per Curiam,*

Do the Bishop of London's licences prevail within the jurisdiction of the Dean and Chapter of St. Paul's? I am desirous to learn as much as I can of the general usage which is asserted in the act and not denied.

*Swabey.*

I apprehend they do not:—but the right of trying causes by appeal is inherent in all dioceses where it is not barred by composition or custom.

*Per Curiam.*

If there be a jurisdiction to hear causes without concurrence, and no visitation on the part of the Bishop,—does it not almost follow that the appeal does not lie to the Bishop? Especially

put their several seals. Given the five and twentieth day of March, in the year of the reign of our Sovereign Lord, James, by the grace of God of England, France, and Ireland, King, Defender of the Faith, &c. the fourteenth, and of Scotland the nine and fortieth, and in the year of our Lord God One thousand six hundred and sixteen, and of the consecration of the said Lord Bishop the eighteenth.

A true copy examined with the Register Book of the Dean and Chapter of Exeter, the first day of May, 1816, by me Ralph Barnes, Chapter Clerk and Notary Public.

if this be according to the general custom of the province?

*Swabey.*

In the case of *bona notabilia* in two peculiars of the same diocese the probate belongs to the bishop. This is constantly so exercised. It is the same in the diocese of London. A list of causes has been produced from 1749 to the present day. In that list there appear to have been two appeals to the bishop, the latter of which was deserted before the libel was given. In the books of the Dean and Chapter there are twenty-five cases in which there have been protestations of appeal to the bishop;—and, on the other hand, there is no instance of any appeal to the metropolitan :—(h) the usage is all one way.

*Phillimore contra.*

It is not intended to deny that in general the appeal lies from the Archdeacon to the Bishop;—or that it can only be taken from the bishop by composition or custom.

But the argument is,—*first*, That this is a peculiar exercising episcopal jurisdiction. *Secondly*, That from all such peculiars the appeal lies to the Archbishop, and not to the Bishop. *Thirdly*, That there is no valid composition; for that of 1616, to which the archbishop was no party, could not oust his jurisdiction. *Fourthly*, That the practice is so contradictory that it cannot avail in argument against general principles.

(d) One appeal was entered to the Prerogative Court of Canterbury.

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*First.* The jurisdiction is denominated a peculiar in those proceedings ;—and it is not denied to be exempt from episcopal visitation.

*Secondly.* The rights of a Dean and Chapter are essentially different from those of an archdeacon ;—and no instance has been produced of an appeal from the peculiar of a Dean and Chapter to a Bishop. In the statute 24 H. 8. c. 12., which had for its object the destruction of the ecclesiastical jurisdiction of the Pope, and the regulation of the course of appeal which was to be substituted for it in this realm, the appeal is directed to be from the Archdeacon to the Bishop. No other mention is made of any appeal from the Dean and Chapter to the Bishop. The sixth section enacts that if the suit be commenced before the Bishop Diocesan or his Commissary, (*d*) the appeal shall

(*d*) V. And furthermore in eschewing the great enormities, inquietations, delays, charges, and expenses, hereafter to be sustained in pursuing such appeals and foreign process, for and concerning the causes aforesaid, or any of them, do therefore, by authority aforesaid, ordain and enact, that in such cases where heretofore any of the king's subjects and residents have used to pursue, provoke, and procure, any appeal to the See of Rome ; and in all other cases of appeals in or for any of the causes aforesaid, they may and shall from henceforth take, have, and use their appeals within this realm, and not elsewhere, in manner and form as hereafter ensueth, and not otherwise, that is to say, First, from the archdeacon or his official if the matter or cause be there begun ; to the bishop diocesan of the said see, if in case any of the parties be aggrieved.

VI. And in likewise if it be commenced before the bishop diocesan, or his commissary, within fifteen days next ensuing the judgment or sentence thereof, there given to the Archbishop



Tie to the archbishop ; and Gibson holds that this is to be extended to all who have *episcopal* jurisdiction ;—and he cites the case of *Johnson v. Ley* (e) in which the Dean of Salisbury, having made letters of request to the Dean of the Arches, a prohibition was refused at the suit of the bishop. In that case it was stated that there were three sorts of peculiars ;—1st. Subject to the bishop ;—2d. Not subject to the bishop, but to the archbishop ;—and the 3d subject to neither.

In *Robinson v. Godsalve* (f) it was ruled that where an archdeacon has a peculiar jurisdiction, he is totally exempt from appeal to the bishop. The Deaneries of St. Paul's and of Lichfield are mentioned in the year (g) Books as exempt from episcopal jurisdiction.

*Thirdly.* If the representatives of peculiar jurisdictions (within a diocese) and of the diocesan meet together, and enter into a composition, no such agreement can be held to affect the rights of the archbishop who is no party to it. Here the very terms of the composition do not constitute them peculiars ; but state them to be before constituted

of Canterbury, if it be within his province ; and if it be within the province of York, then to the Archbishop of York ; and so likewise to all other archbishops in other the king's dominions as the case by the order of justice shall require ; and there to be definitively and finally ordered, decreed, and adjudged, according to justice, without any other appellation or provocation to any other person or persons, court or courts. 24 H. 8 c. 12.

(e) Skinner 589. Gibson 1305.

(f) Gibson 1036. 1 Raymond 123.

(g) Roll. Abr. Ayliffe 417, 419.

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peculiar. Besides, the instrument is imperfect, and there is no proof that it was ever executed.

An affidavit has been made by Kemp, the Registrar both of the Dean and Chapter, and also of the Consistory Court. He states that he finds appeals from the decrees of the Dean and Chapter interposed to the bishop, and then to the Arches ;—if this were proved, it would be something in support of the pretension ;—but no trace appears of any such appeal. He adds that faculties for seats and monuments in churches within the jurisdiction of the Dean and Chapter are frequently granted in the Bishop's Court. If so, they have been erroneously granted ;—otherwise they would afford evidence of a concurrent, and not of a peculiar, jurisdiction on the part of the Dean and Chapter.

An affidavit has been made by Ellard, a proctor, practising in both courts, who declares that he has made search, and finds two causes in which appeals were lodged to the Bishop's Court, one of which was compromised, and the other, from the Dean and Chapter's Court, deserted ;—and he produces a very long list of causes originally, and in the first instance brought in the Episcopal Consistorial Court of Exeter, although the parties cited resided in the Peculiar of the Dean and Chapter.

The inference from this statement is, that the practice of such courts can be of no avail in regulating our practice ;—the conduct of courts in which such irregularities have prevailed cannot affect the decision of the case.

*The Court took time to deliberate.*

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## JUDGMENT.

Sir JOHN NICHOLL.

This is an appeal which has been brought to this Court in a cause instituted before the Dean and Chapter of Exeter, the suit arising originally out of the erection of certain pews in a church without the consent of the ordinary. On the part of Mr. Templer, the Respondent, who appears under protest, it is contended that this appeal is unduly brought.

[*The Judge then stated the substance of the protest, and the reply to it.*]

Now, without going into any further details of the case, it is manifest, I think, that the sole question at present to be decided is, whether the appeal lies to this Court or not. And, in considering that question, it may be proper to examine first how such appeals, and more particularly appeals from Deans and Chapters, lie of common right and by the general law; and then to examine how far the general law is controuled or supported in this particular instance.

Appeals, in some instances, are regulated by statute. Thus the statute of the 24th of Henry VIII. c. 12. is principally for the purpose of preventing appeals from being carried to Rome. It enacts "that in all cases ecclesiastical, the final decision shall be of the king's authority; that the first appeal (if it began in this court) in every such cause shall lie from the sentence of the archdeacon to his diocesan, from his diocesan to the archbishop of the province, and from the archbishop to the king." This statute says nothing of

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exempt jurisdictions to which even the act of the succeeding year (the 25th of Henry VIII. c. 19.) applies only in one respect: it enacts "that appeals from certain abbottries, monasteries, and other religious houses, which had theretofore been exempt, and whose appeals had always gone directly to the Pope, should, for the future, be made to the King." This statute, therefore, applies only to those peculiars which had before been wholly exempt from the jurisdiction both of the diocesans and the archbishop, and which appealed only to the see of Rome; these were now directed to carry such appeals before the King; therefore, neither of these acts directly applies to the present case. The statute regulating appeals from archdeacons does not appear to me to regulate any appeals from Deans and Chapters; for a Dean and Chapter are of a higher rank than an Archdeacon. The Dean himself is next to the Bishop in rank by right of his office and constitution. A Dean is continually styled, we find in Ecclesiastical Records, "Archi-presbyter:" but an Archdeacon is styled "*Archi-diaconus*." And a Dean is, in some respects, co-ordinate with a Bishop. There are, indeed, functions (such as ordination and confirmation,) which can be performed only by a bishop: but the Dean and Chapter has, in some instances, a controul over the Bishop, while the Archdeacon is only an officer of the Bishop, and is sometimes called "*Oculus Episcopi*," subordinate to him, and supervising for him. If Deans and Chapters had been comprehended in the 24th of King Henry VIII., the appeals in all

cases must have been to the diocesan. But we know the fact to be otherwise, even at our own doors; for thus an appeal from the Dean and Chapter of Saint Paul's lies not to the Consistorial Court of the Bishop of London, but to the Arches Court of Canterbury. It seems to me, therefore, that the jurisdiction of a Dean and Chapter is superior to that of an Archdeacon; and is not necessarily comprehended in the statute. Even Archdeacons themselves may, I apprehend, have their peculiars; and, in that case, they would not be bound by the statute of Henry VIII., which applies to the ordinary cases of Archdeacons presiding in jurisdictions, where they are subject to the superior jurisdiction of the bishop, and not to cases of peculiars.

Before, however, I consider the nature of all peculiar jurisdictions, it may be proper to consider, in some degree, what is the true description of a Dean and Chapter. Lord Coke, in his Third Report (a), speaks of Deans and Chapters, and tells us what they are. He says that they are the council of the Bishop; the *senatus Episcopi*; *Episcopi confratres, consilarii, et assessores*; and, in the second place, he says, "they must consent to every grant of the Bishop, in order legally to bind his successors; and, thirdly, they elect him." Fitzherbert says the same thing relative to the necessity of their consent to grants and so forth, and considers the Bishop with the Dean and Chapter rather as one body than as two distinct or

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different bodies : but we very well know that appeals do not lie from one co-ordinate to another, but from a subordinate to a superior authority. In the fourth Institute (*b*), it is declared, that if the bishop appoint a commissary for the more remote and distant parts of an extensive diocese, which commissary is called "*Commissarius Foraneus*," the appeal will not lie from that commissary's decree to the Chancellor of the Consistorial Court of the Diocese, but immediately to the Metropolitan Court ; and this very case occurs in the Diocese of Winchester, where from the Commissary of Surrey, the appeal does not lie to the Chancellor of Winchester, but to the Dean of the Arches.—So, likewise, as I have before observed, the appeal from the Dean and Chapter of St. Paul's, having a commissary of their own, does not lie to the Bishop, but to the Archbishop. It has been said in the course of the argument, and has not been contradicted, that in all other instances the appeal lies from the Dean and Chapter to the Court of Arches. This has not been denied ; and if the fact be so, it will furnish a very strong presumption indeed against the claim set up on behalf of the Dean and Chapter of Exeter. I should be very sorry, however, to rely too strongly on that fact ; merely because it has been asserted on the one side, and has not been contradicted on the other. I have made some enquiry into the subject, (upon which I may presently have one or two observations to make), without being able distinctly

to ascertain whether, in all instances, the appeal lies from the Dean and Chapter to the Court of Arches. I may, however, observe that, having searched into the law authorities with considerable diligence, I find nothing to establish a different principle. Deans and Chapters are of two descriptions :—the one of the old form, and which grew principally out of Papal usurpations ; and the other, those which were erected by the Crown in the reign of Henry Eighth, upon the dissolution of the monasteries and religious houses. Each of these have generally some parishes under their peculiar jurisdiction.

This leads me a little to examine what is the nature of a Peculiar of any kind. Now the very term “peculiar” “*ex vi termini*” supposes an exemption from ordinary jurisdiction. And Ayliffe, in his “Parergon Juris,” heads his chapter “of Peculiars or Exempt Jurisdictions” as if these were synonymous terms. He goes on to say, “Peculiars are called exempt jurisdictions ; not because they are under no ordinary, but because they are not under the ordinary of the diocese, but have one of their own.” And so Gibson in his Codex, and Godolphin also, though they treat the subject more at large, draw the same conclusion. There are, however, different sorts of peculiars ; and they have different rights belonging to them, which must be regulated either by the nature of the peculiar itself, or by ancient usage. There are some more highly exempt than others, I mean Royal Peculiars ; which were anciently exempt from the jurisdiction not only of

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the diocesan, but of the Archbishop also, and which were immediately subordinate to the see of Rome. By the statute of King Henry the Eighth, as already stated, these were placed immediately under the jurisdiction of the Crown ; and all appeals from them lie directly to His Majesty in the High Court of Delegates. But the more common sort of peculiars are those in which the Bishop has no concurrency of jurisdiction, and are exempt from his visitation. These have their appeals directly to the Archbishop, and not to the Diocesan within the circle of whose diocese they are locally situated. There is a third description of peculiars which are still subject to the Bishop's visitation ; and, being so, are still liable to his superintendence and jurisdiction. Wood in his Institute mentions these. He says, " These the Bishop visits at his first and at his triennial visitations." Here the appeal lies from the peculiar to the diocesan : but the right of appeal and the right of visitation seem almost necessarily to go together. And in a case that has been quoted in argument(*a*), Lord Chief Justice Holt said " that there were three sorts of peculiars ; the first Royal peculiars, where the appeal is directed to the King ; the second, peculiars having exempt jurisdiction, such as that of a Dean and Chapter ; and the third, where the jurisdiction is not exempt, but under the controul of the diocesan."

The Bishop and the Dean and Chapter, in some respects, within their respective jurisdictions are

(*a*) *Johnson v. Lee*, Skinner's Rep. 589.



held to be co-ordinate. This may be inferred, in some degree, from the One hundred and fifty-sixth canon, which recites "That whereas Deans, Archdeacons, and others, exercising peculiar jurisdiction within certain dioceses, claim liberty to prove the last wills and testaments of persons deceased within their several jurisdictions, but who have no public nor known place of registry for the same; such possessors of peculiar jurisdiction shall, once in every year, exhibit such original testaments in the registry of the Bishop, or of the Dean and Chapter under whose jurisdiction the said peculiars are, &c." Here the Canon, while it refers to the jurisdiction of the Bishop, at the same time recognizes the peculiar jurisdiction of the Dean and Chapter. This tends to prove that they are to a degree co-ordinate, and not that the Bishop has jurisdiction over the Dean and Chapter. So again in cases of Wills and Administrations, where there are "*bona notabilia*," peculiars are considered as separate jurisdictions, and not as being part of the diocese. For if there be "*bona notabilia*" in a diocese, under the ordinary jurisdiction of the bishop, and also in a peculiar in that diocese, or in two peculiars situated in the same diocese, in such case the probate belongs to the Archbishop. It is expressly so laid down by Gibson, Swinburne, and in a case in Siderfin; and it is declared by those authorities that in such case probate shall be granted, not by the diocesan, but by the archbishop, because such peculiars are exempt from the jurisdiction of the diocesan. Therefore, if upon "*bona notabilia*" being so circumstanced the pro-

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bate is to be granted by the Metropolitan, and not by the Bishop of the Diocese, nothing can more strongly infer that peculiars are exempt from the jurisdiction of the latter. And my Lord Holt, in a case which is in 6 Modern Reports, lays down pretty much the same position. That is an anonymous case: but from the similarity of the subject, and the wording, it appears to me to be the same case as that already referred to of Johnson and Lee. Here a prohibition was applied for upon several points: but on the third point Lord Holt says, "all peculiars are not under the "ordinary of the diocese in which they lie, and "such as are not, cannot transmit any cause to "that ordinary: such transmission must be always "to the immediate superior. The Dean and Chapter of Salisbury have a large peculiar within the "diocese of Salisbury:—but as much out of the "jurisdiction of the diocese of Salisbury as the "diocese of London is. The peculiar jurisdiction "of an archdeacon is not properly a peculiar, but "rather a subordinate jurisdiction. A peculiar "*primâ facie*" is to be understood of him who has a co-ordinate jurisdiction with a bishop."—The general result of this is that a peculiar is not subordinate to, but co-ordinate with, the jurisdiction of a bishop. There is another case in Modern Reports in which it is still more directly and broadly laid down that appeals from peculiars go, not to the diocesan, but to the archbishop. The case is in the 11th Modern Reports (a). "If sentence

(a) p. 6.

" be given in a peculiar, the appeal therefrom is  
 " not to the diocesan but to the archbishop."

**T**his, therefore, directly intimates the general rule  
 of our law to be, that these appeals shall not travel  
 to the bishop, but to the Metropolitan.

Now upon these authorities the practice, the  
 propriety, and the reason of the thing, lead to  
 the same conclusion ; and if the bishop have no  
 concurrence whatever in the hearing of causes, and  
 if the Bishop have no right of visitation, he seems  
 to be in no one particular the ordinary of the place :  
 but the peculiar is *quoad hoc* co-ordinate with the  
 Bishop, and the only appeal is to the metropolitan.  
**T**here may, indeed, have been specially and ori-  
 ginally reserved to the Bishop some particular  
 acts ; such as the granting probate to the will  
 of persons of higher degree, and the granting  
 of licences ; and certainly, as far as these ex-  
 ceptions go, the peculiar does not exclude the  
 Bishop. But if the peculiar has the hearing of  
 causes as well "*ad instantiam partis*" as "*ex*  
*officio*," and is exempted from visitation, it should  
 seem, in common propriety, that his superior is not  
 the Bishop, but the Metropolitan,

I have directed some enquiry to be made into  
 the registers of this Court as to appeals which  
 have been made to its jurisdiction. Carrying  
 back the search above eighty years, to the year  
 1737, I find that there have been about thirty ap-  
 peals from different peculiar jurisdictions not dio-  
 cesan. Some of these have been from Deans and  
 Chapters, some from Archdeacons, and one from  
 a Prebendary. There are not less than three and

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twenty from Deans and Chapters. And they have been brought from a great many different Deans and Chapters and Deans :—from the Dean of Sarum, the Dean of Litchfield, the Dean and Chapter of Norwich, the Dean and Chapter of Wells.

Here are appeals from seven different archdeacons, Canterbury, Northampton, Oxford, Hereford, Ely, Norwich, and Huntington; and one from the prebendary of Aylesbury. These parties, it should seem, appealed from Peculiars'; for I should be a little at a loss to account for these appeals from archdeacons, unless in those particular instances the archdeacons had peculiar jurisdictions, and were not to be considered in the ordinary acceptation of archdeacons, but as those having jurisdictions exempt from the Bishop; for otherwise the appeal was irregular and in the face of the statute of Henry the Eighth.—But I am not aware that one instance is to be found in which an appeal has been brought from Deans and Chapters to the Bishop, and afterwards from the Bishop to the Archbishop. The conclusion which I draw from this view of the subject is this, that as by the general rule of law a peculiar is not subject to the ordinary authority of the diocesan; so the appeal does not lie from the peculiar, and more especially the peculiar of a Dean and Chapter, to the Diocesan, but to the Metropolitan.

The peculiar in question is that of the Dean and Chapter of Exeter, which is clearly of the species I have just taken a view of;—namely, exclusive of the Bishop in the hearing of causes, and exempt

from the Bishop in point of visitation. The very instrument which has been produced by the party who objects to the present appeal so asserts the nature of that peculiar to be. It is stated in this instrument that the Dean and Chapter and their successors shall for ever after do and perform certain acts, and that they shall "solcly and *without any concurrence*, hear and determine within their said several peculiars, all causes, as well *ad instantiam partis*, as *ex officio*." But archdeacons in their jurisdiction are only declared to have "a concurrent power with the Bishop to hear causes." It goes on to state that the Bishop, within his own peculiars, and in the rest of his diocese, shall exercise his own ordinary jurisdiction. And, lastly, the said Bishop and his successors are to have visitation and inhibition within certain archdeaconries, &c. but here again the peculiars of the Dean and Chapter are expressly excepted out of this right of visitation. So that by this very instrument, brought in by the respondent himself, it is clearly shewn that this diocese follows the general rule of law, that is, that the peculiars of the Dean and Chapter are completely exempted; that they have the sole right without any concurrence of hearing all causes whatever, and that they are exempt from the visitation of the Bishop.

The case then comes to this: Whether this extraordinary anomaly of the appealing to the diocesan has been made out, and established by competent authority. Two species of evidence have been offered in support of this part of the case: the one, the agreement or composition; and the other,

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usage. With respect to this composition it is of no very high antiquity ; it seems to have been made not earlier than the reign of James the First; consequently, sometime after the dissolution of the monasteries, and when the jurisdictions to which they became liable had been arranged ; nor, as far as respects the right of appeal, were the parties either competent or disinterested persons ; for the agreement is made between the Bishop, the Dean and Chapter, the Archdeacon, and their officers. It states that this agreement or composition is made upon a view of ancient usage, and upon searching and consulting proper authorities. But it does not state how far any such search was made, nor recite any particulars to prove this ancient usage. In short, whether it may not be altogether irregular and an usurpation, the instrument itself does not afford any means of ascertaining. The search was most probably made, not by the Archdeacon or the Bishop, or by any of the principals, but by their agents or officers ; possibly some practitioners in these Courts not very well versed either in the canon or the civil law of the country. As far as they had conflicting claims, such for instance as related to what parishes belonged to each of them as peculiars, these persons might be safely relied on, because they would form a check upon each other. But who was to check them as to this right of appeal ? To the officers of the Dean and Chapter, if they exercised all the original jurisdiction, it was a matter of little consequence, and it could little concern them to what court the causes

afterwards travelled; whether they went to the diocesan or to the Metropolitan Court. But these other persons, the Bishop's officers, on the contrary had an interest in saying that the appeal lay in the first instance to their Diocesan Court, because it was likely to bring to themselves additional business and additional profits; and in some instances the very same persons might be the officers of the one Court and the other. The suitors, however, to whom this question was one of immense importance, and the Metropolitan whose duty it was to protect the rights of all the suitors in the courts of his province, none of these persons were in any degree parties to this instrument. And, therefore, against the general principles applying to the case, the agreement does not appear to me to be sufficient to establish a different rule from that to which I think it to be otherwise liable.

The evidence of usage goes no further back than about the middle of last century; and is of still less effect; for it is so extremely irregular, and, in some respects, so contrary to the agreement itself, that the one defeats the other. Between the years 1750 and 1819 there are about twenty-four cases in the Court of the Dean and Chapter where the appeal has been *asserted* to the Diocesan Court. But in all those cases, excepting only two, the appeals were deserted without any application being made to the Diocesan Court, and without any inhibitions being granted; in two instances inhibitions were granted; and of these two, the one was settled by arbitration, and the

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other was deserted before any libel was given in the cause. So that in point of fact there is no one instance in which an appeal from the Court of the Dean and Chapter has ever been brought to a hearing, and prosecuted in the Diocesan Court, still less has the direct question ever been raised and decided, even in that jurisdiction: yet, in order to amount to any sort of authority upon such a point as the present, this Court would require something more than even a decision of the Diocesan Court:—it would require the decision either of the Metropolitan Court, or a decision at Common Law. Nothing of that sort has been produced.

On the other hand, here is a list of about thirty cases occurring at different times, and of all descriptions: profane swearing, brawling in church, erection of pews, divorce cases, cases of nullity of marriage, in short, cases of every imaginable sort that can be brought into an Ecclesiastical Court, and arising within the jurisdiction of the Dean and Chapter; yet, these are all commenced in the Diocesan Court directly in contravention of this agreement itself; for that agreement says that the jurisdiction of the Dean and Chapter shall be exclusive, and not concurrent. And, therefore, all such instances are manifestly in breach of the rights of the Court of the Dean and Chapter, and are in direct violation of the agreement. This proves such an extreme irregularity, that I confess these other instances have no weight in the opinion of the Court.

It may be further observed that the policy of the law is against the claim which is here set up in the

protest. For though the law favours the right of **appeal**, yet it does not favour the multiplication of **appeals**. It would be a serious grievance upon the subject to be liable to be dragged through a **fourth** court before he can get at the final decision of his suit; and, therefore, although where a **certain** course of appeal is clearly by law established, the suitor cannot go "*per saltum*" from an inferior to a superior court passing over the intermediate Court; yet where no such intermediate Court is already settled and established, the intervention of a fourth jurisdiction would be found productive of great delay and expense. The appeal from this Court is to the Delegates; and to introduce another intermediate Court before the cause arrives here, would be that against which the law would very strongly lean, because it would be very highly inconvenient to suitors.

Upon the whole, therefore, I am of opinion that by the general law, the appeal from a peculiar, and more especially from the peculiar of a Dean and Chapter having exclusive jurisdiction to hear and determine all causes without any concurrent jurisdiction whatever, and being exempt from the visitation of the diocesan, lies to the Court of the Archbishop; and I see no sufficient evidence in this case to render the Dean and Chapter of Exeter an exception from the general rule. Upon these grounds I overrule the protest.

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REDDALL v. LEDDIARD.

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May 8.

A marriage declared null because the guardians of a minor were not appointed by an instrument attested by two witnesses.

JUDGMENT.

Sir JOHN NICHOLL.

THIS is a suit brought by a woman, acting by her guardian, to declare her marriage void ;—the facts are clearly proved ;—the minority of the woman, and the sort of consent given.

The only question is, Whether it was a valid consent.—The marriage was solemnized on the 8th of October, 1818. The parties were both minors. The licence was obtained on the oath of the man, swearing that he was of age :—but he appears not to have been twenty. The woman is described as a minor with the consent of two persons alleged to be her guardians. It excites regret and disgust to see how lightly these affidavits are made ;—the man could scarcely not know that he was a minor ; more caution should be used with respect to these affidavits ;—they trifle with the sanctity of an oath in a manner to undermine the very foundation of society. The licence was granted with the consent of the testamentary guardians of the woman, who both appeared and signed the consent. The father and mother were dead : but the father had made a will, and appointed the two persons guardians who have given their consent. But the Court has to consider whether that consent is such as the Marriage Act requires, that is, the consent of the guardians of the person lawfully appointed.

By the Common Law a father has no right to appoint guardians (a) by his will, that power was given by statute ;—this statute enables a father to do what he could not do before ; consequently, he must do it according to the requisites of the statute, which are by deed or will attested by two witnesses ;—the will was not attested by two witnesses, or executed in the presence of two witnesses :—if the appointment has not been made according to the statute they are no guardians at all ; and, therefore, not guardians in the sense of the Marriage Act.

I am under the necessity of pronouncing this marriage to be null and void.

(a) 12 Car. 2. c. 24. s. 8.

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EXCHEQUER COURT OF LONDON.

LADY HARRIET BLAQUIERE v. BLAQUIERE.

JUDGMENT.

SIR WILLIAM SCOTT.

The parties having lived together three years after their marriage, separated in 1814, on account of differences :—what they were, whether arising from incompatibility of temper, does not appear ;—310*l.* per annum, the produce of the wife's own fortune, were settled on her ;—and this sum has been continued to her ever since.—It has occurred in this case that while they were living in that state of separation the husband committed an act of adultery, which possibly might not have occurred in other circumstances. His separate income amounts to 750*l.* or 800*l.* ;—and the question turns on the deduction of 160*l.* per annum, the interest of money borrowed for the improvement of a house and land he has purchased in Sussex, which he says after the improvements are deducted are not worth more than 160*l.* per annum ; but it

is to be remembered at the same time that he has the enjoyment of this house of which she has no participation. On what ideas this sum of 300*l.* per annum was originally settled we have no account : it is the bare produce of her own fortune. I cannot think the 160*l.* per annum quite clear from claim on her part ; she is entitled to some consideration for the want of a residence. At the same time it would be improper to dismiss out of my consideration that there are two sons who are to be maintained in a rank corresponding with that of the father and mother ;—and not only to be maintained, but to be educated. I think I shall not depart from a just consideration of the effect of these circumstances, if I give a moiety of this 160*l.* in addition to the 300*l.* per annum now paid to the wife.

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PREROGATIVE COURT OF CANTERBURY.

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May 31.

HUNTER v. BULMER.

PER CURIAM.

Where a party intervening in a cause, alleges that he proceeds no further, costs given.

It is almost a matter of course where a party alleges that he proceeds no further to give costs, unless some special circumstances are shewn why he should not be liable.

I think I must give costs. I take it up, not on the merits of the case, but on the general ground that the party is to be condemned in costs, unless he shews special grounds why he should not.

I must in this case adhere to the general rule. Costs are incurred by the intervention. I shall give 10*l. nomine expensarum.*

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

ECCLESIASTICAL COURTS

OF

Doctors' Commons;

AND IN THE

HIGH COURT OF DELEGATES.

ARCHES COURT OF CANTERBURY,

BEEVOR *v.* BEEVOR. (*a*)

1800.
Trinity
Term,
July 9.

JUDGMENT.

SIR JOHN NICHOLL.

This is a prayer by the husband to the Court not to tax the costs of the wife, or to relieve him

(*a*) It will be seen from the dates of this case, and of the two which immediately follow it, that they would more properly have found their way into the First Volume of this Work: but in two of them the Editor's notes were very imperfect, and those from which the judgments are taken, have only recently come into his possession—the other, *viz.* the office of the Judge promoted by Kemp *v.* Wickes, has long been before the Public, and in a shape almost as authentic as that in which it now appears: but the importance of the decision has induced a very general wish that these Reports should not be closed without including it.

VOL. III.

T

An application on the part of the husband to be relieved from taxation of the costs of the wife, rejected.

CASES DETERMINED IN THE

from the burthen of them to such extent as to the decision of the Court shall seem meet.

The general rule is, that the wife has a right to have her costs taxed at all times. The reason is because there are no other means of obtaining justice, since the marriage gives all the property to the husband. The rule however is not universal—the exception is where the reason fails—where the wife has separate property of her own; for then marriage does not give all the property to the husband.

That there are exceptions appears by the cases, as in *Furst v. Furst*; the Consistory Court refused alimony and costs: the Court of Arches refused alimony, but gave costs, and the Delegates affirmed the sentence of the Consistory. (a) The wife had 200*l. per annum*, the husband only 100*l.*; therefore the necessity did not arise.

In *Holmes v. Holmes* (b) the costs were refused. I suppose there was no foundation for the appeal: it was in a cause for the restitution of conjugal rights.

In *Pomfret v. Pomfret*, where the wife had 2000*l. per annum*, separate property, the application was made at the conclusion of the cause, when the Court had had an opportunity of seeing that the charge was not duly proved, and refused costs as to that part.

In *Davis v. Davis*, (c) the wife had all the property.

(a) Delegates 1740.

(b) 1755.

(c) Consistory, 1786.

In *Wilson v. Wilson*, the wife had 440*l.* *per annum*, the husband 400*l.*, and four children to maintain.

These cases shew that exceptions to the general rule exist: but only where the principle of the rule does not apply; where it is not necessary in order to enable the wife to carry on the suit, and to obtain justice.

Here the prayer is in the alternative: to what extent it is prayed does not appear. In the first instance the expenses are for the consideration of the Registrar on taxation—to allow no unnecessary expenses. I presume he will only allow those to which the husband is liable.

It is said there has been delay—the suit commenced in 1802; but it does not appear that it is imputable to the wife to any great extent—there has been some delay in giving the libel. The defendant offered a case in which the Court doubted whether it could give relief—additional articles were brought in—on the whole the Court thought the case laid before it was one which it was bound to entertain. But treaties of agreement from time to time were alleged on both sides. The husband was not pressing on—there is no ground to say the proceedings of the wife were vexatious. Finding a large sum (165*l.*) taken off, I must conclude that the Registrar has taken off the unnecessary expenses—a large sum is still chargeable. But length of time is the consideration—in a degree this is attributable to the husband who entered into treaties. I do not see it is a case in which on account of delay, I can relieve, if it is an ordinary case in which the

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husband would be liable—is it such? The wife has received 85*l.* 10*s.* for the last two years; the husband admits 81*l.* *per annum*. He now claims deductions which would leave about 700*l.* During the suit, in all she has received about 70*l.* *per annum*, that is, one-tenth of the income of the husband—this is not the usual alimony.

This is not like the other cases cited—there is not sufficient income to aliment the wife—she could not carry on the suit. That she lives with her mother does not alter the case; her mother is not bound to maintain her. And there is less reason for the husband to make the application, as above 500*l.* *per annum* of his income came with the wife. The costs, therefore, are to be taxed in the usual way.

The Court regrets that the negotiation did not succeed: but as the cause is to go on, I shall expect it will proceed with more than ordinary diligence—it is the interest of the public as well as of the parties that there should be no delay.

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The office of the Judge promoted by KEMP *v.* WICKES.

A minister of
the Establish-
ed Church
cannot refuse
to bury the
child of a
Dissenter.

JUDGMENT.

SIR JOHN NICHOLL.

This suit is brought against the Reverend John Wight Wickes, described as the Rector of Wardly cum Belton, for refusing to bury the infant child of two of his parishioners. The usual proceedings have been had in the institution of this suit; and

articles are now offered detailing the circumstances of the charge proposed to be proved. The admission of these articles is opposed, not upon the form of the pleading, but upon the entire law of the case; it being contended, that if the facts are all true, still the clergyman has acted properly, and has been guilty of no offence. This is certainly the proper stage of the cause for taking the decision of the Court upon the point of law; for, if the facts when proved should constitute no offence, it will only be involving the parties in useless litigation, and keeping alive unnecessary animosity, if they should go on to the proof of these facts. If, on the other hand, the facts are true, and the defendant has, through ignorance of the law, or otherwise, violated its injunctions, it is the shortest way to admit the facts, and to submit to the legal consequences. It is indeed to be collected, from the mode in which the arguments have been conducted, that a spirit of candour actuates both the parties; they wishing merely to ascertain by a judicial decision what the law is upon the subject, in order to set the question at rest generally, and in order that these particular parties may live in charity and kindness with each other.

The articles plead, in the first place, the incumbency of Mr. Wickes. In the second article the 68th canon is recited, which directs "that no minister shall refuse or delay to christen any child according to the form of the Book of Common Prayer, that is brought to the Church to him upon Sundays or Holidays to be christened; or to bury any corpse that is brought to the church or church-yard, (con-

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venient warning being given him thereof before) in such manner and form as is prescribed in the Book of Common Prayer: and if he shall refuse to christen the one or bury the other, except the party deceased were denounced excommunicated *majori excommunicatione* for some grievous and notorious crime, (and no man able to testify of his repentance) he shall be suspended by the bishop of the diocese from his ministry for the space of three months."

The articles then go on to plead, "that Mr. Wickes did in August, 1808, refuse to bury Hannah Swingler, the infant daughter of John Swingler and Mary Swingler his wife, of the parish of Wardley cum Belton aforesaid, then brought to the said church, or church-yard, convenient warning having been given: that Hannah Swingler died within the parish of Wardly cum Belton, and being the daughter of the said John Swingler and Mary Swingler his wife, who are Protestant Dissenters from the Church of England of the class or denomination of Calvinistic Independents, had been first baptized according to the form of baptism generally observed among that class of Dissenters; that is to say, with water, and in the name of the Father, and of the Son, and of the Holy Ghost, by the Reverend George Gill, a minister, preacher, or teacher, in all respects duly qualified according to law, and of the same class of Protestant Dissenters; and that of that fact of baptism Mr. Wickes was sufficiently apprized, upon application being made for the burial of the infant in the church-yard of the said parish in manner and form

as is prescribed in the Book of Common Prayer : but he assigned the same," that is, the form of the baptism, " expressly as the ground of his not complying with the said application." Here, then, it is pleaded, and it is undertaken to be proved, and at present in this respect the articles must be taken to be true, that Mr. Wickes did not doubt on the question of fact that the infant had been so baptized; but he refused upon the ground of law, namely, that he was not bound to bury a person of that description. The remaining articles are in the usual form ; they are not material to be stated for the purpose of considering the question that is now to be decided.

In these articles it is pleaded that the minister was required by regular warning to bury this infant in the form prescribed by the Book of Common Prayer and by the Canon. The Canon, not made merely (as has been thrown out) for the protection of the clergy, but made for their discipline also, and to enforce the performance of their duty, prohibits the refusal of burial in all cases except in the case of excommunicated persons, and punishes such refusal ; and perhaps the learned Counsel who spoke last is correct in saying, that by the general description " persons" is here to be understood Christian persons ; and therefore that, where application was made for the burial of any persons who might not be considered as Christians, they did not come within the description of the Canon. The Rubric, however, which is that part of the Book of Common Prayer that contains directions for the performance of the different offices, adds two other

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exceptions expressly. The Rubric before the office of burial is in this form:—"Here is to be noted, that the office ensuing is not to be used for any that die unbaptized, or excommunicate, or have laid violent hands upon themselves." And, by the old law, burial was refused to persons of the same description, and indeed of some other descriptions; persons who had fallen in duels, and some others, were interdicted from receiving Christian burial: but here the Rubric does expressly state, "that the office is not to be used for persons unbaptized or excommunicated, or who have laid violent hands upon themselves."

These directions, contained in the Rubric, are clearly of binding obligation and authority. Questions indeed have been raised respecting the Canons of 1603, which were never confirmed by Parliament, whether they do, in certain instances, and *proprio vigore*, bind the laity: but the Book of Common Prayer, and therefore the Rubric contained in the Book of Common Prayer, has been confirmed by parliament. Anciently, and before the Reformation, various liturgies were used in this country; and it should seem as if each bishop might in his own particular diocese direct the form in which the public service was to be performed: but after the Reformation, in the reigns of Edward the Sixth and Queen Elizabeth, acts of uniformity passed, and those acts of uniformity established a particular Liturgy to be used throughout the kingdom. King James the First made some alteration in the Liturgy; particularly, as it will be necessary to notice, in this matter of baptism. Immediately

upon the Restoration the Book of Common Prayer was revised. An attempt was then made to render it satisfactory, both to the Church itself, and to those who dissented from the Church, particularly to the Presbyterians; and for that purpose conferences were held at the Savoy: but the other party requiring an entire new Liturgy on an entire new plan, the conference broke up without success. The Liturgy was then revised by the two houses of Convocation; it was approved by the King; it was presented to the Parliament, and an act passed confirming it in the 13th and 14th Charles II., being the last act which has passed upon the subject; and so it stands confirmed to this day, except so far as any alteration may have been produced by the Toleration Act, or by any subsequent statutes.

The Rubric then, or the directions of the Book of Common Prayer, form a part of the statute law of the land. Now that law in the Rubric forbids the burial service to be used for persons who die unbaptized. It is not matter of option; it is not matter of expediency and benevolence (as seems to have been represented in argument,) whether a clergyman shall administer the burial service, or shall refuse it; for the Rubric, thus confirmed by the statute, expressly enjoins him not to perform the office in the specified cases; and the question is, whether this infant, baptized with water in the name of the Father, the Son, and the Holy Ghost, by a Dissenting minister, who is pleaded to have qualified himself according to the regulations of the Toleration Act, did die unbaptized within the true meaning of the Rubric. If the child died un-

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baptized, the minister was not only justified, but it was his duty, and he was enjoined by law, not to perform the service. If the child did not die unbaptized, then he has violated the Canon, by a refusal neither justified by any exception contained in the Canon itself expressly, nor by any subsequent law.

The question has been most ably and most elaborately argued by the counsel on both sides ; and not only are the parties, but certainly the Court itself is, under very considerable obligation to them for the assistance which it has received in considering this question.

To ascertain the true meaning of the law, the ordinary rules of construction must be resorted to ; first, by considering the words in their plain meaning and in their general sense, unconnected with the law ; and, in the next place, by examining whether any special meaning can be affixed to the words, when connected with the law, either in its context or in its history.

The plain simple import of the word "unbaptized," in its general sense, and unconnected with the Rubric, is, obviously, a person not baptized at all, not initiated into the Christian Church. In common parlance, as it is sometimes expressed, that is, in the ordinary mode of speech and in the common use of language, it may be said that this person A. was baptized according to the form of the Romish Church ; that another person B. was baptized according to the form of the Greek Church ; that another person C. was baptized according to the form of the Presbyterian Church ; that another



person was baptized according to the form used among the Calvinistic Independents ; and that another person was baptized according to the form used by the Church of England : but it could not be said of any of those persons that they were unbaptized ; each had been admitted into the Christian Church in a particular form ; but the ceremony of baptism would not have remained unadministered, provided the essence of baptism, according to what has generally been received among Christians as the essence of baptism, had taken place.

Such being the general meaning of the word in its ordinary application and use, and standing unconnected with this particular law, is there any thing in the law itself, in its context, that varies or limits its meaning ? The context is, that the office shall not be used for persons who die unbaptized, or excommunicate, or that lay violent hands upon themselves. What, then, is the description of persons excluded from burial that is put in association with these unbaptized persons ? Excommunicated persons and suicides.

Now excommunication, in the meaning of the law of the English Church, is not merely an exclusion from the Church of England, but from the Christian Church generally. The ecclesiastical law excommunicates Papists. The ecclesiastical law excommunicates Presbyterians. Dissenters of all descriptions from the Church of England are liable to excommunication. But what is meant by the Church of England by the term of excommunication can be best explained by the articles of that Church. By the 33d article it is expressly stated,

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“ That person which by open denunciation of the Church is rightly cut off from the unity of the Church and excommunicated ought to be taken of the whole multitude of the faithful as an heathen and publican until he be openly reconciled by penance, and received into the Church by a judge that hath authority thereunto :” that is, he is no longer to be considered as a Christian, no longer to be considered as a member of the Christian Church universal, but he is to be considered “ as an heathen and a publican,” for those are the words of the article.

It has been said, that in this country a foreign excommunication could not be noticed, and that a foreign country could not notice an excommunication by this country ; and certainly that is true, for no laws can be made binding and compulsory beyond the country over which the authority making the law extends. The articles of religion, though confirmed by act of Parliament, only extend to this country, and to the subjects of this country. The discipline of the church and its punishment by excommunication can therefore only extend to this country : but all his Majesty’s subjects, whether of the Church of England, or whether dissenting from that Church either as Papists or as any other description of Dissenters, are bound to consider an excommunicated person as an heathen and a publican, be the person himself of the Church of England, or be he of any other class or sect. This is the first description of persons put in association with persons unbaptized.

The next description is that of suicides : they

are supposed to die in the commission of mortal sin, and in open contempt of their Saviour and of his precepts ; to have renounced Christianity ; to have unchristianized themselves ; that is the view which the law takes of the persons who are self-murderers.

Then, taking the context of the law, putting unbaptized persons in association with excommunicated persons and with suicides, both of whom are considered as no longer Christians, it leads to the same construction as the general import of the words ; namely, that burial is to be refused to those who are not Christians at all, and not to those who are baptized according to the forms of any particular church.

Having thus considered the words in their general meaning, and as connected with the context of the law, it may not be improper, before the Court proceeds to what is next proposed, namely, the history of the law, to notice another rule of construction, which is this ; that the general law is to be construed favourably, and that the exception is to be construed strictly. Here the general law is, that burial is to be refused to no person. This is the law, not only of the English Church ; it is the law, not only of all Christian Churches ; but it seems to be the law of common humanity ; and the limitation of such a law must be considered *strictissimi juris*.

It is with some degree of surprize, that the Court has heard the suggestion of there being no law to compel the Clergy to bury Dissenters. This seems to be most strangely perverting, or rather

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inverting, all legal considerations. The question is not,—Is there any law expressly enjoining the Clergy to bury Dissenters : but, Does any law exclude Dissenters from burial ? It is the duty of the parish minister to bury all persons dying within his parish, all Christians. The Canon was made to enforce the performance of that duty, and to punish the refusal of burial : nothing can be more large than the Canon is in this respect. It does not limit the duty to the burial of persons who are of the Church of England ; he is to bury all persons that are brought to the Church, upon convenient warning being given to him. The Canon has the single exception, expressly of excommunicated persons. The Rubric adds the other express exceptions, of persons unbaptized and suicides. It is true that the Canon says they are to christen any child, and to bury any corpse ; and hence it has been suggested, that the Canon means they are only to bury those who have been first christened according to the form of the Church : but the Canon says no such thing, nor does the Rubric say any such thing ; there is nothing of the sort to be found in any express law ; nothing can be more general than the injunction to bury all persons, and all persons who are not specially excepted are entitled to that rite. Exceptions, then, being to be construed strictly (for it is always to be presumed that if the lawgiver meant that his exception should be more extensive he would have expressed his intention in clear and distinct words) ; and exceptions not being to be extended by mere implication so to limit the general law, it would

be necessary, in order to give to the exception the meaning which has been contended for in argument (namely, that of excepting all persons who have not been baptized by a lawful minister of the Church of England according to the form prescribed in the Book of Common Prayer), that it should have expressed it, not only by the term persons "unbaptized," but by the terms "persons who have not been baptized according to the form prescribed in the Book of Common Prayer." It has not done so, at least in express terms.

It was proposed, then, to examine the history of the Law in order to see whether the Rubric, though it has not this exception in express terms, still by the general term "unbaptized" has this limited meaning, "not baptized according to the forms of the English Liturgy and by a lawful minister of the Church of England." Now, if the Church of England has recognized persons, though not baptized in its own forms and by its own ministers, yet as *validly* baptized; if it has recognized *lay* baptism to be, though irregular, yet *valid*, and so *valid* that the person who has been baptized by a *Laic* cannot properly be baptized again; it will necessarily follow, that it cannot mean to exclude from burial all persons who have not been baptized according to the forms of its Liturgy, that it can only mean to exclude those who have not been baptized at all by any form which can be recognized as an initiation—a legal and valid initiation, into the Christian Church.

This leads me into a very extensive question, namely, the validity of lay baptism; but which the

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Court is, however reluctantly, compelled to examine, by the nature of the case, and the arguments which have been offered to its consideration.

The Law of the Church of England, and its history, are to be deduced from the ancient general Canon Law—from the particular constitutions made in this country to regulate the English Church—from our own Canons—from the Rubric, and from any acts of Parliament that may have passed upon the subject ; and the whole may be illustrated, also, by the writings of eminent persons.

Now if the first head be enquired into (the ancient Canon Law), it will appear that, from the earliest times, the use of water with the invocation of the name of the Father, of the Son, and of the Holy Ghost, was held to be the essence of baptism ; that baptism, so administered, even by a layman or a woman, was valid ; and that a person, who had been so baptized, was not to be baptized again.

It may not be improper just to refer to the passages of Scripture, which have been referred to by the Church itself as the foundation of its law in this respect :—they are these. First, the words of our Saviour ; “ Unless a man be born again of water, and of the Spirit, he cannot enter into the kingdom of God.” Hence the Church, without presuming to decide whether a person unbaptized might not be saved through God’s mercy, yet has held that baptism was so strongly enjoined as a matter of indispensable necessity, that rather than omit it altogether, the ceremony was to be per-

formed even by a layman. The words of our Saviour after his resurrection, "Go and teach all nations, baptizing them in the name of the Father, and of the Son, and of the Holy Ghost," have been held to require the invocation of the Holy Trinity, as the essential form of words necessary to baptism. The passage in the Epistle to the Ephesians, "One Lord, one faith, one baptism," has been held by the Church to prohibit a second baptism; or, as the learned Hooker has expressed it, "Iteration of baptism once given has always been thought a manifest contempt of that ancient apostolic aphorism, 'one Lord, one faith, one baptism.'" It is here, however, to be observed, that the Court is not entering into any question of theological controversy; it is merely endeavouring to trace and to ascertain the fact,—what has been held by the Church to be the law. The Court has only to administer the law, as it finds it; it is not to presume to enter into any speculations upon its propriety.

Now, conformable to what has been already stated will be found the text of the canon law. The passages in that law are almost innumerable. Many have been cited by the counsel. In the third part of the decree *De Consecratione*, and in the fourth distinction *De Baptismi Sacramento*, there are a great number of paragraphs to this effect: and it may be sufficient just to state the titles of the different paragraphs or sections of that distinction. For instance, the nineteenth paragraph states, *nemo nisi sacerdos baptizare presumat*; certainly directing that regular baptism is to be adminis-

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tered by the priest ; or, perhaps it may be more properly said, *public* baptism. The 21st section is, *etiam laici necessitate cogente baptizare possunt* ; “ in cases of urgency laymen may baptize.” The 23d, *non reiteratur baptismum quod a pagano ministratur* ; “ if baptism has been administered by a Pagan, it is not to be iterated ;” so cautious was the ancient Church that there should be no re-baptism. The 25th, *sicut per bonum ita per malum minister æque baptismum ministratur*. The character of the person who administered, therefore, was of no effect in the validity of baptism. The 26th is to the same effect, but rather more explanatory : *Non merita ministrorum, sed virtus Christi, in baptismo operatur*. The 28th, *Non reiteratur baptismum quod in nomine Sanctæ Trinitatis ministratur* : and it goes on to illustrate by an example, *Si qui apud illos hæreticos baptizati sunt, qui in sanctæ Trinitatis confessione baptizant, et veniant ad nos, recipiantur quidem ut baptizati, ne Sanctæ Trinitatis invocatio vel confessio annullatur*. This, therefore, points out that the essence was the invocation of the Holy Trinity. The baptism of any Heretics (and the Church deemed all Dissenters to be of that description), that of any Dissenters, who made use of the name of the Holy Trinity in baptism, was to be received, lest the invocation of the Holy Trinity should be rendered and considered as of no effect. The 32d, *Non reiteratur baptismum quod in fide Sanctæ Trinitatis ab Hæreticis præstatur* : that, therefore, is to the same effect as the former section. The 36th is, *Valeat baptismum, etsi per laicos mi-*

nistratur ; and that section again explains the principle upon which the Church acted, *Sanctum est baptisma per seipsum quod datum est in nomine Patris, Filii, et Spiritus Sancti*. There are many other passages to the same effect, confirming all the foregoing ; and it is perfectly clear that, according to the general Canon Law, though regular baptism was by a Bishop or Priest, yet, if administered by a Laic, or by a Heretic or Schismatic, it was valid baptism ; and so valid that it was not to be repeated.

The next branch of the Law of our Church, and which reached down to the time of the Reformation, was the law which is to be found in the legatine and provincial constitutions: the former being laws made in this country under the sanction of the Popes' Legates, Otho, Legate of Gregory the Ninth, and Gthobon, Legate of Clement the Fourth. The latter, the provincial constitutions, were those made in convocation under several Archbishops. The whole of these have been collected by the very eminent English Canonist, Lyndwood ; who has written a very learned commentary or gloss upon them, which is also of high authority in all courts administering the ecclesiastical law of this country. These constitutions are precisely to the same effect as the former. Regular baptism was to be administered by a priest, and in the church, and at certain stated times of the year : but in cases of urgency a layman might administer baptism in private houses, rather than it should not be administered at all. If a layman interposed without necessity in the office, he was punishable : but still the

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baptism was valid, and by no means to be repeated.

In the constitution of Otho *De Baptismo et Formâ Baptizandi*, which will be found in Lyndwood, page 10 of the Legatine Constitutions, it is among other things directed, that Priests shall particularly instruct their parishioners in the form of baptizing: of course shewing that lay baptism was allowed; that it was recommended, rather than that no baptism at all should take place; otherwise it could not have been proper and necessary for the Priests to have instructed their parishioners in the form. The constitution of Othobon, to be found in Lyndwood, page 80, confirms and approves of this former constitution, and enjoins precisely the same thing. The provincial constitutions of Archbishop Peccham particularly enjoin, that after baptism by a Layman it is not to be iterated. The passage will be found in Lyndwood 41, *Caveant sacerdotes ne baptismum legitime factum audeant iterare*; and Lyndwood, in his gloss upon the word *baptismum*, says, *Sive per Laicum sive per Clericum etiam per Paganum in casu necessitatis*; so that it is good, “whether by a Layman, or a Clergyman, nay even in a case of necessity by a Pagan;” and, in his gloss upon the words *legitimè factum*, he says, two things are essential to it, *duo sunt necessaria, verbum et elementum aquæ*; and in describing what is meant by *verbum*, he explains the form of the words to be those which have been always used, “I baptize thee in the name of the Father, and of the Son, and of the Holy Ghost.” In a further constitution of Archbishop Peccham, to be found in

page 244, it is again strongly enjoined not to baptize a second time persons who have been baptized by laymen or by women; and he speaks rather strongly of those Priests who do so baptize, terming them *stolidi sacerdotes*: and the constitution, concludes, *Quod si sacerdos rationabiliter dubitet an parvulus in formâ debitâ baptizatus sit, dicat, Si baptizatus es, ego non rebaptizo te; si nondum baptizatus es, ego baptizo te in nomine Patris, et Filii, et Spiritûs Sancti.* Lyndwood here again cautiously explains the words *in formâ debitâ*, as he had before, to mean by the use of the element water, and by the use of the words of the invocation of the Holy Trinity; and that it was *in formâ debitâ*, though by a Layman.

Now these passages shew, not only that those baptisms were held to be valid, but they shew how extremely cautious the Church was that Baptism should not be repeated. These references to the ancient law will also serve to explain and illustrate any matter, which could be considered as doubtful in the construction of the more modern law of the Rubric. It therefore seems to admit of no doubt, that by the law of the English Church, as well deduced from the general Canon Law as from its own particular constitutions, down to the time of the Reformation, lay baptism was allowed and practised. It was regular, and even prescribed, in cases of necessity: it was so complete and valid, that it was by no means to be repeated. It also clearly appears that, in order to ascertain its validity, no enquiry was necessary to be made into the existing urgency under which it was adminis-

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tered ; but only into what was declared to be the essence, whether it had been administered by water, and in the form of the invocation ; for, if those forms were used, the baptism by a layman was complete and valid.

So the matter stood at the time of the Reformation : and that period is an important one ; for, if lay baptism had been considered as one of the errors of the Romish Church, it would have been corrected at the time when all the Christian world had their attention pointed to those particular errors. But the fact is otherwise, for the use of lay baptism was manifestly continued by the English Reformed Church. Liturgies were framed, and acts of uniformity passed by Parliament, in the reigns of Edward the VIth and of Queen Elizabeth. In those the Rubrics run thus : “ *Let those that be present* call upon God for his grace, and say the Lord’s Prayer if the time will suffer : and then *one of them* shall name the child, and dip him in the water, or pour the water upon him, saying these words, ‘ I baptize thee in the name of the Father, and of the Son, and of the Holy Ghost.’ ” Here is no mention whatever of a Priest or lawful Minister, as the person who is to officiate upon the occasion : it is directed to be done by “ those who are present,” or one of them, without singling out or particularizing what the person is to be who is to administer this Sacrament. And the better opinion seems to be, that all private baptism was by laymen, antecedent to the time of king James ; that it was only public baptism in the church which was to be administered by a Priest ; and that, wherever there

was the want of urgency and necessity which
ventured the child being brought to the church
required he could to be baptized at home or
baptism was to be administered by any person
without requiring the attendance of the par-
sonage Rubric, although it enjoins the minister
to baptize their children at home in case of
necessity: yet, lest the necessity should be
expressly directs the pastor to instruct the
fathers in the form of doing it. However
that subsequent to the Reformation the
Reformed Church itself did always
baptism.

So the practice stood from the
time of king James the first
the year 1553, among ourselves
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orderly. Up to that time, wherever private baptism was allowed, there was nothing to be found in the ancient Canons, the Constitutions of the Church, or the Rubric, that required the minister as a person at all necessary to be present for the orderly administration of such private baptism : it was not even to be inferred that it would be more regular, for the minister is not mentioned ; on the contrary, in cases where private baptism was necessary (and it was only allowed in cases of necessity) the people were to be instructed how to perform it themselves. The most to be deduced from this article therefore is, that it was thought at that time, by the convocation, that it would be more proper, regular, and decent, to have the ceremony of private baptism performed by ministers ; and therefore it was directed to be performed by them, and Laics were restrained from doing it : but the article, as before stated, does not appear to have been published.

King James the First (who considered himself a great divine) disapproved of the practice of lay baptism. Soon after his accession conferences were held at Hampton Court with the Clergy for the purpose of revising and reconsidering the Liturgy, and particularly this article of private baptism. The King expressed strongly his disapprobation of lay baptism ; and seemed more inclined to no baptism at all than that the office should be performed by a Laic : but his divines (most of them prelates of very great eminence) differed from him in respect to preferring the total omission of baptism to its being administered by a layman. It was, however, agreed so far to alter the Rubric, as to direct that private

baptism should be administered by a lawful minister: but whoever reads the account which has been preserved of these conferences will see, that neither the King nor the Bishops maintained that baptism, if *de facto* performed by a Laic, was *invalid*; on the contrary, even king James expressly declared his opinion to be, that if baptism had been performed by a Laic with water and the invocation of the Trinity (which he also admitted to be the essence of the Sacrament itself) such baptism was not to be iterated; that is, that the person was not to be re-baptized; for the king's words, as recorded, are, "I utterly dislike all re-baptization on those whom women or Laics have baptized." He himself, therefore, considered lay baptism as valid, though he thought fit to enjoin the administration, even of private baptism, to be by a clergyman as much more orderly and proper.

The Rubric at that time agreed on was never confirmed by Parliament; but a proclamation afterwards appeared "for the authorizing an uniformity in the Book of Common Prayer;" and His Majesty says in that proclamation, "We have thought meet that some small matters might rather be explained than changed." The proclamation has no suggestion whatever of so important a change in the English Church—in the established constitution of that Church as it had existed, not only in early times, but as it existed after the Reformation had taken place—as that baptism actually administered even by a Laic in the due form with the element and the words should be considered as wholly null and invalid, and that such a

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baptism could bear re-baptization. There is nothing of the kind in the proclamation ; on the contrary, explanations in some small things rather than a change are alone referred to.

In construing all laws, it is proper to enquire how the law previously stood ; for it will require more express and distinct terms to abrogate and to change an old established law, than to provide for a new case upon which the former law has been wholly silent. Private baptism by Laymen had always been held valid, and almost enjoined as regular. The Rubric having now introduced the order that it shall be administered by the lawful Minister,—what would be the obvious construction of this alteration ? That in the regular and ordinary and decent administration of private baptism, it became the duty of the lawful Minister to perform the office. But if the old law was meant to be completely changed ; if it had been intended to invalidate the old law in this respect, and that all other baptism, except that by a lawful Minister should be considered as absolutely null and void ; the new law would most expressly and distinctly have declared it.

Upon this rule of construction, the case of marriage has been referred to as strongly analogous. Marriages are by the Rubric enjoined to be solemnized by a minister : there is to be a previous publication of banns, and other ceremonies are to be observed ; the laws of the Church, and the state by several acts of Parliament, prohibited marriage to be performed in any other way : it punished the parties concerned in clandestine marriages, both the

minister who solemnized them, and the parties between whom they were solemnized. But, notwithstanding all these laws enjoining how a marriage was to be solemnized, and punishing those who solemnized it in any other way,—what was the consequence?—did the marriage become void? By no means. A marriage, in a private house, between minors, was a perfectly valid marriage (notwithstanding it was an irregular, and, so far, an unlawful marriage) till the Marriage Act by direct and positive terms expressly declared that such a marriage should be null and void to all intents and purposes. So baptism in a house, to be regular after this Rubric, could only be administered upon occasions of urgency, and by a minister of the Church: but if it was performed by a layman, and without necessity, (though it was an irregular baptism, though the parties might be punished for violating the injunctions of the Rubric,) still it was not an invalid baptism, and the party could not be re-baptized.

The Rubric itself, as published by King James, leads to the very same conclusion. Certain questions are directed to be asked for the purpose of ascertaining whether the child has been already baptized; and the questions run in this order and form: "If the child were baptized by any other lawful minister, then the minister of the parish where the child was born or christened shall examine and try whether the child be lawfully baptized or no. In which case, if those that bring any child to the church do answer that the same child is already baptized, then shall the minister examine them further, saying,—By whom was this child

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baptized Who was present when this child was baptized? Because some things essential to this sacrament may happen to be omitted through fear or haste in such times of extremity ; therefore I demand further of you, With what matter was this child baptized? With what words was this child baptized? And if the minister shall find by the answers of such as bring the child that all things were done as they ought to be, then shall not he christen the child again, but shall receive him as one of the flock of true Christian people."

Now it by no means follows, from asking "by whom was this child baptized," or "who was present when this child was baptized," that the person who administers the ceremony is essential to the validity of the baptism, or that those enquiries are made for the purpose of ascertaining whether the baptism be valid or not? For it is obvious that it is not essential who were the persons present. Why then is it to be inferred as essential who was the person by whom the ceremony was performed? On the other hand, it may be extremely proper and convenient to enquire into both those circumstances, for the purpose of enabling the minister more satisfactorily to ascertain whether the essentials themselves have been performed ; for if the office has been performed by a lawful minister, then there is less suspicion of irregularity or defect in the performance, and a less minute enquiry may satisfy the minister that the baptism has been properly administered. Again, if the persons present at the baptism were respectable intelligent persons, or persons who are at the time attending, and who

therefore can be further questioned by the minister in respect to the essentials of baptism, it may be material and proper for that reason to enquire who were the persons that were present. Hence it appears that these questions being introduced does not establish that a minister was essential to the administration of the rite: but more especially, when we find this preamble to the third and fourth questions interposed in the middle of the queries "because some things *essential* to this sacrament" (for so I think is the natural mode of reading it, and not in the way in which the emphasis was laid by the counsel, "because *some* things essential to this sacrament") "may happen to be omitted," (for if any thing essential was omitted, it might be proper to consider the baptism as null) "therefore I demand of you, With what matter was this child baptized? With what words was this child baptized?"

If any doubt could be made upon what is meant by the Rubric in this respect, it would be cleared up most satisfactorily by adverting to the old law upon the subject; and by the old law (as has been already stated) it was the use of the water and the invocation of the Holy Trinity that was essential to the baptism; those, as Lyndwood has explained, were the *duo necessaria*.

Again,—if every thing has been "done as it ought to be." What is meant by the phrase "done as it ought to be" is explained, by adverting to the commentary of Lyndwood; for he has stated in his gloss the terms *rite ministratus, legitimè factum, and formâ debitâ* to mean the use of water and

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the form of words : this can therefore leave no doubt what was the meaning of the Rubric, thus illustrated as it is by reference to the ancient law and to Lyndwood.

But the concluding part of the Rubric is equally decisive upon the subject ; for it is, “ If they which bring the infant to the church do make such uncertain answers to the priest’s questions as that it cannot appear that the child was baptized with water in the name of the Father, and of the Son, and of the Holy Ghost (which are essential parts of baptism), then let the priest baptize it in the form before appointed for public baptism of infants, saving that at the dipping of the child in the font he shall use this form of words, “ If thou art not already baptized, I baptize thee in the name of the Father, and of the Son, and of the Holy Ghost.” If there were a doubt then whether the child was baptized with water, and with the invocation (which are here expressly declared to be essential parts of baptism), then the child was to be conditionally and hypothetically re-baptized, the Church being so extremely anxious to avoid iteration. But, supposing a doubt arose whether the former baptism had been administered by a lawful minister,—was the child in that case to be re-baptized even hypothetically ? Such a doubt might very easily happen : the persons present might not be able to answer who the person was that had baptized ; or they might not be able to answer whether the person who had administered the baptism was or was not a lawful minister. He might have been an entire stranger to them ; and yet, if that fact appears

doubtful, here are no directions in the Rubric for a conditional re-baptization. Hence it is obvious, that the person performing the baptism was not essential by the Rubric ; and in this respect the Rubric exactly conformed to the old law, for the baptism remained valid, and was not to be repeated ; and even to what King James said at the conference just before this Rubric was approved, that he utterly disliked all re-baptization.

After the Restoration, the Rubric was revised, and was confirmed by Parliament; and no alteration was made, except in the title of the office : for, unless I have been misled by a book of some authority (not having seen the Prayer Book of the time of King James), the title of King James's office for the administration of private baptism was this, "Of them that be baptized in private houses in time of necessity by the minister of the parish, or other lawful minister that can be procured." Now the title of the office stands thus : "Of the ministration of private baptism of children in houses ;" there is an omission, therefore, in the title, of the words "lawful ministers," or any thing referring to them. This alteration in the title, if it meant any thing as applied to the present question, seems pretty strongly to infer that the title was considered as in too precise a manner requiring both the existence of the necessity, and the intervention of a lawful minister ; and the title of the office was therefore left in more general terms, "Of the administration of private baptism in houses" simply ; and it was only in the directory part, as in marriages, that it was set forth, let the "lawful minister" say so and

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so, inferring that lawful ministers were the persons regularly to perform the office, and that it was considered a part of their duty.

So the matter still remains ; and, after tracing the law through the several stages of its history, it appears impossible to entertain a reasonable doubt that the Church did at all times (whatever might have been the opinions of particular individuals upon this point, as there will be difference of opinions among individuals upon all points—that the Church itself did at all times) hold baptism by water in the name of the Father, and of the Son, and of the Holy Ghost to be valid baptism, though not administered by a priest who had been episcopally ordained,—or rather, to state it more generally, though administered by a layman or any other person. If that be so, if that is the construction of baptism by the Church of England, then the refusal of burial to a person “unbaptized,” that term simply being used, cannot mean that it should be refused to persons who have not been baptized by a lawful minister in the form of the Book of Common Prayer ; since the Church itself holds persons not to be unbaptized (because it holds them to be validly baptized) who have been baptized with water and the invocation by any other person, and in any other form.

During the usurpation, it was most highly probable that great numbers of the subjects and inhabitants of this country—be their proportion greater or less, it does not much vary the consideration,—but there must have been a great number of persons, after episcopacy and its ministers had been discounte-

nanced for a great number of years, who had received baptism from persons not episcopally ordained. Now, if those baptisms had been mere nullities, what would have been the course at the Restoration? Surely to direct that such persons should be baptized, provided they were to be considered as persons unbaptized because they had not been baptized by a lawful minister, according to the form of the Book of Common Prayer. But there is no trace to be found either in the historical or controversial writings of those times, that such a measure was adopted: nothing that leads even to a suspicion of it. On the contrary, it will be found that one of the first cares of the bishops, upon the Restoration, was to go about confirming;—and confirming whom? Why, confirming the very persons who had been thus baptized; considering, therefore, and necessarily considering, that though these baptisms might be held to be irregular, yet they were to be considered as valid; otherwise no confirmation could take place upon them. Not only did they confirm, but I apprehend they must have ordained in many instances, upon those very baptisms: indeed, the one would seem almost of course to follow the other. They must also have buried great numbers who had been baptized in no other way.

The practice also, as I understand, has always been, if Presbyterians or any other Dissenters from the Church of England have come over to that Church, and have become members of it, nay, have become ministers of it, they have never been re-baptized. Their baptism being with water and

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with the invocation of the Trinity, has always been considered as a sufficient initiation into the Christian Church to qualify them to join that Church, to become members, and even to become ministers, of the Church of England. The same practice has prevailed with respect to Catholic converts; they have never been re-baptized: and, though they have been baptized by persons episcopally ordained, and persons whom we consider to be so far ministers, being Catholic ministers, as not to require that they be re-ordained, yet they have not been baptized according to the Book of Common Prayer; and the Rubric is as precise in requiring that the office shall be administered in that particular form, as it is that it shall be administered by a regular minister. Yet Catholic converts are not re-baptized if they choose to become ministers of the Church of England; still less are these persons excluded altogether from the rite of burial: and yet if the term "unbaptized" in the Rubric means what has been contended for, namely, "those persons who have not been baptized by a lawful minister of the Church of England, and according to the form prescribed by the Church of England," no persons dissenting from that Church, neither Catholics nor Protestants, are baptized in that form. If those persons are considered by the practice and constitution of our law as lawfully baptized, it appears there is an end of the question.

But the matter was placed, by the learned counsel who last spoke, in a much more favourable shape. The Court is not to decide whether this be a valid baptism, so as to entitle the person



to become a member of the English Church or a minister of the Established Church ; but whether the person so baptized is excluded from burial by the Established Church : it is a question of exclusion and of disability. Now the Church of England does not refuse the office of burial to all persons who are not conforming members of this Church ; there is no law to be found to that effect. Papists, who ever since the Reformation have been considered as much more widely separated from the Reformed Church than Protestant Dissenters, are not only permitted to be buried by our Church, but are required so to be. Popish Recusants are required to be buried in the church or church-yard, or a penalty is incurred by their representatives ; and this not by putting the body into the ground without the ceremony being performed, but the minister is to read the service ; our Church knowing no such indecency as putting the body into the consecrated ground without the service being at the same time performed.

It may not be wholly unworthy of observation, that this very act of Parliament, compelling the burying of Popish Recusants in the church or church-yard and by the Church in the same manner as the other subjects of his Majesty, passed only in the third year of King James, very soon after the alteration of the Rubric. Could he then mean by the Rubric, that no persons but members of the Established Church should be buried by it ; and that all other persons non-conforming should be excluded from it ? The union of the two crowns had just taken place ; many of his Majesty's Scotch

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subjects had followed him into England; his own children had come with him, his own children had been born in Scotland, and were baptized by Presbyterian ministers. Could he ever intend that all persons but members of the Church of England should be excluded from church burial? Indeed, it is to be observed, that in his Canon and in his Rubric there is nothing that expressly interdicts the burial service from being performed for persons "unbaptized." The only express exception there is "persons excommunicate." It has been ingeniously argued that that amounts to pretty much the same thing; for that the Canons declared those persons to be excommunicate who did not conform, and several Canons to that effect have been noticed. But the 68th Canon only excepts from burial one "denounced excommunicated *majori excommunicatione* for some grievous and notorious crime, and no man able to testify of his repentance." Now an infant baptized by a Presbyterian minister or by a layman would surely not have come within this exception; and therefore, during the reigns of King James and King Charles the First, this being the only exception to be found in the Canon, a minister would certainly have violated the Canon by refusing to bury a person so baptized, unless that person came within the general description of not being a Christian at all.

The Rubric, made upon the Restoration, introduced the words "unbaptized and persons who had laid violent hands upon themselves" into the preamble to the burial service. Now, was there any thing in the circumstances of those times which

should give a different construction to the term "unbaptized?" It should seem just the reverse. Here had been (as already stated) an usurpation of twelve years, during which many, at least, had not received baptism in the forms of the Church: they were yet considered as validly baptized, to the extent that they were confirmed without re-baptization. They were even ordained; and it seems to be utterly incredible, that the convocation in revising the Rubric, or the King and Parliament in confirming it, could have meant, by introducing the word "unbaptized" into the Rubric before this office, that those only who had been baptized according to the form of the Church could receive the performance of this office. It would be most extravagant to suppose that such was the intention of introducing it into this Rubric. In every view of this subject, and the more accurately and fully it is considered the more clearly it appears, that burial cannot in such a case be refused; and it should in no view of the subject be forgotten, that the question is a question of disability and exclusion from the rights which belong to his Majesty's subjects generally,—an exception from a general law.

It seems by no means proper, however, wholly to pass over the view which may be taken of this subject as affected by the Toleration Act. By that act, an important change was worked in the situation of his Majesty's Protestant Dissenting subjects; and the baptisms now administered by Dissenting Ministers stand upon very different grounds from those by mere laymen. There were many laws, both of Church and State, requiring

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conformity to the Church, creating disabilities, imposing penalties, and denouncing excommunications upon all non-conformity. Now, supposing that during the existence of these disabilities it could be maintained, that in point of law no act of non-conformists could be recognized in a court of justice, and therefore that a baptism administered by such persons could not be noticed at all, either by the Church or by the courts administering the law of the Church, yet could it be maintained now that such a baptism was to be considered as a mere nullity? If such could have been considered as the view of the law before the Toleration Act, yet that act would change the whole shape of the thing: that act removed the disabilities; it allowed Protestant Dissenters publicly to exercise their worship in their own way under certain regulations; it legalized their ministers, it protected them against prosecutions for non-conformity.

Now, their ministers and preachers being allowed by law (and so far as that goes they are lawful ministers for the purposes of their own worship),—their worship being permitted by law—their non-conformity being tolerated,—could it any longer be said, that rites and ceremonies performed by them are not such as the law can recognize in any of his Majesty's Courts of Justice, provided they are not contrary to, nor defective in, that which the Christian Church universally holds to be essential, that is, provided they are Christians? This appears to be a necessary consequence of the Toleration Act. The manner in which that act has been considered by other Courts is not altogether foreign

to the consideration. Its general principle was much canvassed in the famous case of *Evans v. The Chamberlain of London*. The particular circumstances of that case are foreign to the consideration of this. The case began in a jurisdiction in the city. It was afterwards appealed to a commission of the Judges, and then to the House of Lords; and, in the first of the stages of the appeal, a very eminent judge, Mr. Justice Foster, thus expressed himself in his judgment: "The defendant does not plead the Toleration Act to excuse one offence by another; but to shew that, although the Rubric did require conformity in all things, yet by the Toleration Act the Rubric is taken out of the way, and does not extend to his case. The Act of Toleration is not to be considered merely as an act of connivance; it was made that the public worship of Protestant Dissenters might be legal, and they might be entitled to the public protection." So again Lord Mansfield, in the House of Lords, said, "Conscience is not controulable by human laws, nor amenable to human tribunals; and attempts to force conscience will never produce conviction. Non-conformity is no offence by the common law, and the pains and penalties for non-conformity to the established rites of the Church are repealed by the Act of Toleration." This shews something of the general view taken of that statute by the judges of the common law. Acts of Non-conformists are now legalized; and they are to be recognized, and were upon that occasion recognized, in Courts of law. Indeed, the Legislature itself (as has been pointed out) has recognized the baptism of Dissenters;

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for stat. 23 Geo. III. c. 67. which laid a duty upon registers of baptisms by the Church, was extended by stat. 25 Geo. III. c. 75. to the registers of baptism of Protestant Dissenters. Both are now repealed: but the passing of that second statute is a recognition of baptism by Protestant Dissenters.

Protestant Dissenters then, being allowed the exercise of their religion, being no longer liable to pains and penalties,—their Ministers lawfully exercising their functions,—the rites of that body being allowed by the law,—it can no longer be considered that any acts and rites performed by them are such as the law cannot in the due administration of it take any notice whatever of, or that a baptism performed by them, when attended with what our own Church admits to be the essentials of baptism, is still to be looked upon as a mere nullity, or that infants so baptized are to be rejected from burial as persons unbaptized at all, or in other words (though that has been disavowed by the Counsel in the argument) as not being Christians—for the Court finds it difficult not to concur with the learned counsel who spoke last, that *unbaptised* and *not being Christians* amount to pretty much the same thing.

Having thus examined the law itself, it may seem superfluous to consider what may be the opinions of ecclesiastical writers upon the subject: but they lead to the same conclusion. The opinion of the learned Hooker has been stated: his eminence has been referred to and admitted on all sides, and it cannot be placed in a higher point of view by any

observation that would fall from the Court. The very accurate and careful examination of this question by Bishop Fleetwood has been stated. They are both of them decidedly of opinion that lay baptism is legal and valid, according to the law of the Church. Watson's *Clergyman's Law*, and Bishop Burnet, have also been referred to; and if what has been related of a very eminent and learned prelate of the Church, the late Bishop Warburton, be true, he is another practical authority. The circumstance I allude to was this. A person who had applied for holy orders, but was rejected, went into the country pretending that he was ordained; and he performed various sacred functions, and among others he administered baptism in very many instances. When it was at length discovered that he had not been ordained at all, the parents of the children, who had been baptized by him, felt considerable uneasiness, and wished the Minister of their parish to re-baptize their children. The clergyman of the parish very properly consulted his diocesan, Bishop Warburton: but the Bishop charged him on no account to re-baptize the children; for that the baptism already administered, though performed by a mere layman, was a valid baptism, and that the church did not allow a re-baptization. This fact, if it be true, (and the Court has no reason to doubt it) at the same time that it does honour to this distinguished prelate by shewing how accurately he had studied the law and the constitution of the Church of which he was a ruler, is another authority in opposition to the almost only

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authority which has been relied upon on the other side, and that is Mr. Wheatley.

Now, if the character and the reputation of the different writers were to be matter of consideration, there could not be any great doubt whether the weight lay with Hooker and Fleetwood and the other persons who have been referred to, or with Mr. Wheatley: but if the writings themselves be examined, the difference may perhaps be still more striking. In the former writers, particularly in Hooker and Fleetwood, there are not only great powers of reasoning, but accurate references to legal authority. In the latter, there is a great deal to be found that rests upon assertion, and assertion only. This writer, among other things, maintains that no person is to be buried but those who are baptized by the Established Church: nay, he seems to go further, that no persons are to be buried but those whose baptisms have been registered; for his words are these, "all persons are supposed to die unbaptized but those whose baptism the registers own; and therefore, the registers not owning dissenting baptisms, those who die with such baptisms must be supposed to die unbaptized." Now this is assertion, but nothing more; for there is no authority whatever referred to in support of it,—there is no law to be found which so declares,—there is no practice which justifies this as being the rule. And to what extent—to what monstrous length, would this go? No foreigners who are in this country,—not only no Catholics, but no persons born in any Protestant country in Europe,



coming into this country and dying here, could be buried according to the forms of the Church of England, because they are persons clearly not registered in this country, clearly not baptized by a lawful Minister of this country, or according to our Book of Common Prayer. Not only these, but none of his Majesty's Scotch Presbyterian subjects could be buried here, no member of the Church of England whose baptism has been by omission neglected to be registered in his parish; nay, a person born in one part of the kingdom, if he happened to die in another, and a distant part of the kingdom, could not receive Christian burial, from the want of facility to procure the register of his baptism.

It has been asked, If you do not require proof from the register, what other proof can you have? how are the clergy otherwise to find out who are baptized, and who are not? To that it may be properly answered, they must be satisfied with *reasonable* evidence,—with what a person acting fairly, and not captiously, would require; for if a clergyman meant to act vexatiously, and, under the pretext of not being satisfied of the fact, when taking all the circumstances of the case together no doubt could reasonably be entertained upon the subject, refused burial, he would not only be liable to the punishment of the law, but exposed to that punishment in its utmost extent. In the present case, there appears however no difficulty of the sort: for the articles assert that the child was baptized according to the form generally observed among that class of Dissenters;—that Mr. Wickes

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and the fact as the ground of his refusal. Since he was acting certainly much more properly, in pretending to doubt a fact of which he had no conscientious doubt; and though he has, perhaps, unfortunately mistaken the law, it was much more honourable not to state a doubt of the fact, but to act upon the existence of his doubt of the law.

It has been said, that the present case is important, both to the interest of the Dissenters and of the Church. It may be important to the Dissenters, that their right of church burial should be established, and that their baptisms should be recognized, and should not be considered as mere nullities; for that goes far to the denial of their being Christians at all; and every thing which savours of disability and exclusion is of importance to any subjects of his Majesty; and, if the law does not exclude them from church burial, no blame whatever can be imputed either to the individual, or to the body, if the body countenance the individual, in the attempt now made to assert the right of burial by the institution of the present suit. But how the object of the suit can be that, which has been suggested by the Counsel, namely, for the purpose of establishing their Ministers as "lawful Ministers," is difficult to be imagined. As *lawful dissenting* Ministers, they are already established; for the law allows them and recognizes them as such; and the event of this suit cannot by possibility make them lawful Ministers of the Church of England episcopally ordained, nor can it in any manner alter their station and character in the political society of the country.

The importance of the suit to the interests and dignity of the Church is not less difficult to be apprehended. If the *legal* rights of the Church were affected, it would not be more the duty than the inclination of the Court to uphold them. The suit may be interesting to individuals who have been embarked in controversy and contest; it may be interesting to the clergy in general, who are doubtful what the law is, that the law should be ascertained by a judicial decision: but why the rights and interests of the Church are to be affected by considering dissenting baptisms as Christian baptisms,—by allowing persons so baptized the common right of being buried according to the ordinary forms of the Church, and by a minister of the Church to whose support they are bound to contribute, has not been explained. If the law has not excluded them from this ordinary right of Christianity and humanity, the ministers of the Church will not surely be degraded by performing the office. On the contrary, the generality of the Clergy, it may be presumed, will rejoice that in this last office of Christian charity there is no separation between the Church and their Protestant Dissenting brethren. It is by a lenient and a liberal interpretation of the laws of disability and exclusion, and not by a captious and vexatious construction and application of them, that the true interests and the true dignity of the Church establishment are best supported.

Upon the whole of the case, and for the reasons assigned, the Court is of opinion that the minister, in refusing to bury this child in the manner pleaded

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in the articles, has acted illegally. The suit is probably brought for the sake of deciding the question, rather than of punishing the individual. The minister may have acted, and it is presumed has acted, from a sense of his public duty : for, upon his understanding of the law, it was his duty, and he was bound, not to perform the service, which he might most willingly have performed if he had more correctly understood the law. The Court has therefore thought it proper to state its opinion, and the grounds of that opinion, the more fully, in the hope of setting the question at rest, and of putting an end to the suit. If the facts are truly stated, and the decision now given upon the law should be acquiesced in, it may reasonably be expected, from the spirit of candour which has been avowed on the part of the promoter, that he would be satisfied in correcting the error, and in establishing the right ; and that the suit might end here, and harmony be restored between these parties, each of them recollecting that, however they may differ upon certain points either of doctrine or of ceremony, still they are both equally bound by Christian charity to dismiss as quickly as possible from their minds all feelings of animosity, and to return to the exercise of mutual kindness. The Court, upon the grounds already stated, has no doubt at all in admitting these articles, and does admit them accordingly.

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NORTH v. BARKER.

1810.  
*Trinity*  
*Term,*  
*July 16.***JUDGMENT.**

Sir JOHN NICHOLL.

This is a suit for dilapidations at St. Cross:—  
 the libel states the estimate to have been 5327*l.*;—  
 the allegation for the defenant states another estimate to have been 3795*l.*; which was tendered, and refused. The question is, whether the tender was sufficient, or whether the plaintiff has proved more to be due. The parties have not desired the Court to send a third surveyor to arbitrate between them. Clarke (*a*) has laid it down that if the plaintiff has given an estimate, the opposite party may examine another surveyor to contradict the estimate, and prove it to be excessive:—this may be done, and was done in the case of the *Bishop of Rochester v. Thomas*.

Dilapidations  
at St. Cross—  
conflicting  
estimates;—  
the tender of  
the defendant  
affirmed with  
costs.

It may be observed that the burthen of proof is on the plaintiff;—the tender admits a certain sum to be due. The estimate of the plaintiff is supported by two eminent surveyors,—the estimate on the other side by three; numbers are not conclusive, in case there are other reasons why two should outweigh the three;—but it is something that in point of character they stand equal before the Court as eminent surveyors.

The Court, however, is to look to some of the circumstances arising out of the case itself:—Mr.

(a) *Praxis*, Tit. 115.

1810.  
Trinity  
Term.

NORTH  
v.  
BARKER.

Money Penny was first employed alone by Mr. North the plaintiff, he went down afterwards with Mr. Craig. Money Penny was thirty-five years old, and had had some experience : but two others of them had had twenty years more. Craig has had more than any of them.

It is not a matter of mere fact, but of opinion and judgment, in which a man may depose strongly without being aware of a bias. There is nothing to shew any promise of the work to Money Penny,—he might rather be expected to be the surveyor of the work than the contractor,—a high estimate would find favour with his employer:—he might be called upon to undertake the work at his own estimate, if thought low. These surveys are generally paid for by a per centage on the estimate ;—all these things may give something of a bias. I think it was proved even by Mr. Craig that Money Penny had over-estimated, for he would not join in his report, differing to the amount of 500*l*. I am therefore inclined to think that Money Penny overrated the matter.

There has been an opening of floors, &c. ;—as the others say, beyond what was necessary:—this would rather shew over-zeal to constitute something of a deduction. Money Penny treats it lightly,—says it might be repaired for forty shillings ;—Craig allows twenty pounds. I find Money Penny guilty of inadvertence likewise in subscribing Craig's survey instead of his own:—it also appears to have been the original intention of the parties that Wilson and Money Penny should make a joint estimate, and perhaps if this had been done the matter might

have been settled two years ago: but Wilson states that there was a difference of opinion between them respecting the principle.

I have looked through the survey, and the statement does impress my mind as having been made on a very large scale; it looks like renovating the building not only in its ancient form, but in its pristine beauty;—there has been estimated a relaying of all the old pavement;—in some instances it should seem as if things were to be added which were never there before. I think this is going beyond the principle;—for although these Courts carry the point far as to the incumbent's house, they will not go so far as to buildings of this kind. The stone-work of fine old windows is decayed,—this is serious when the obligation to repair them occurs;—there must be some moderation,—the thorough repair of the old building is not all to fall on one incumbent;—this last incumbent received 450*l.* for dilapidations—he laid out 2,220*l.* in his whole incumbency, which was for about twenty years;—and 500*l.* within the last few years.

The income is stated to be 650*l.* When the Court sees nearly one-sixth of the income laid out voluntarily, and when in cases where the Court is called upon to sequester it seldom lays apart more than one-fifth;—when it finds that by Gilbert's act if the repairs exceed one year's income the incumbent may burthen his successor,—when the sum here demanded amounts to eight years' income—and even the sum tendered to that of six years,—the sum demanded strikes me as enormous.

The Court could not decide on such circumstances.  
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1810.  
*Trinity*  
*Term.*

NORTH  
v.  
BARKER.

1810.  
Trinity  
Term.

NORTH  
v.  
BARKER.

stances alone ;—yet these open the door to the opinions of the other surveyors, and enable me to decide that their estimate and tender are sufficient.

Three surveyors state that the work might be done for the lower sum ;—they are more in number, have greater experience, and they made their estimate jointly ;—they swear they have been liberal,—more so than usual, to prevent disputes. The Court can form no judgment as to the amount : but looking to the principles which they state, I do not object to them.

The estimate has been revised on account of an additional rise in materials ;—this was perhaps going beyond the legal demand—for the Court rather thinks it ought to be estimated as at the death of the last incumbent ;—the debt was then accruing. The representative of the incumbent loses an advantage of timber which may be applied to the repairs. If some little items have been overlooked, this sum remains to cover them. These surveyors offer to undertake to do the work for the sum stated, although they are not in the habit of contracting, and that they will do it to the satisfaction of two surveyors, or any one of six named,—or of the surveyor of the Court ;—this the other party is not bound to accept ; but it goes far to satisfy the Court of the justness of the estimate.

I think the plaintiff has failed to prove more to be due than the tender. I pronounce for the tender :—of course costs must follow.

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## PREROGATIVE COURT OF CANTERBURY.

PRENTICE v. PRENTICE.

1820.  
Easter  
Term.  
May 12.

**JOHN PRENTICE**, of Stoke Newington, died on the 19th of February of the present year, a widower and intestate. He left three daughters, and two sons. His two sons were in the West Indies; two of his daughters Hannah and Anne, lived with him at the time of his decease; the other, Mary Maxwell, was alleged to have been taken up as a vagrant, and confined for several days in the Giltspur-street prison, a few weeks before her father's death.—The deceased kept a chandler's shop; and was possessed of 100*l.* navy 5 *per cents.*, besides the stock in his shop and his household furniture.

A proctor  
condemned in  
costs for im-  
proper prac-  
tices in the  
conduct of a  
suit.

Mr. Jenner appeared as proctor for Hannah Prentice; and took the regular steps for procuring for her the administration to the effects of her father.—On the 6th of March the letters of administration were in their progress through the Prerogative office, when Mr. W. G. Clarkson appeared as proctor for Mary Prentice; and on being informed that the bond was already taken, and that the letters of administration for Han-

1820.

*Easter**Term.*

PRENTICE

v.

PRENTICE

nah Prentice were actually filled up, he entered a caveat to prevent them from issuing under seal—and immediately afterwards applied at the office of the Commissary of London for letters of administration for Mary Maxwell Prentice, although the parish of Stoke Newington in which the deceased lived and died was not within the jurisdiction of the Commissary of London. On the 7th of March, however, he procured letters of administration to Mary Maxwell Prentice from the Commissary of London; Hannah Prentice thereupon applied for and obtained a *distringas* to prevent the transfer of the 100*l.* 5 *per cent.* Bank annuities to her sister.

These facts were set forth by Jenner in an act on petition, which concluded by praying the Judge that he would direct the administration to issue under seal to Hannah Prentice;—that he would assign W. G. Clarkson to bring the pretended letters of administration obtained from the Commissary Court of London into the registry of the Prerogative Court,—and condemn his party in the costs of the suit.

To this statement no reply was offered by the adverse proctor.

JUDGMENT.

SIR JOHN NICHOLL.

The first question is to render justice to the parties. This Court never forces a joint administration, unless the parties agree to it. I have only to consider who is the most proper person. No objection is taken to Hannah Prentice: but it is stated that the other person applying has been

taken up as a vagrant ; and by her conduct in this suit she has shewn herself to be an improper person ; the act is not written to on her part ; it is said she has no money. I have no doubt but that injustice has been done to Hannah Prentice, and that she has been kept out of the administration to which she was entitled for two months.

It is a painful task to arraign the conduct of a proctor : but facts are disclosed in the act on petition which Mr. Clarkson was bound to contradict. He appears to have lent himself to a very improper act—he applied to the Prerogative Court for administration for Mary Maxwell Prentice—he found another next of kin had been already sworn, and that the bond was filled up. He proceeded to enter a caveat ; by this conduct shewing that he knew the Prerogative Court to be the proper jurisdiction. He however took his party to another jurisdiction (the Commissary Court of London) which had no authority to grant the administration ; he there however obtained it ;—these facts are strong against the proctor. The explanation he has offered is not satisfactory. When he was aware that a Prerogative administration was about to issue, he purposely, and without notice, went to another jurisdiction, by which the other party has been many months fraudulently kept out of the administration.

I feel justified in condemning the proctor in the expenses ; and I shall consider whether it may not be expedient to go a step further, and to suspend him from his functions.

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1820.

*Easter  
Term.*

PRENTICE

v.

PRENTICE.

1820.  
*Trinity*  
*Term.*  
*June 10.*

WOOLLEY and GORDON v. GREEN.

An application to continue a certificate of service before a process served on the Royal Exchange had become returnable into Court, rejected. An administration with the will annexed, granted to a creditor, limited to filing a bill in Equity.

**CHARLES PERKS**, of Walsall, in Staffordshire, died in July 1819, having made his will but appointed in it neither an executor or residuary legatee. He had no child : but he left a widow, brothers, a sister, and the children of a deceased sister.

Isaac Newton, one of the legatees, instituted a suit to prove the will, which was contested by Samuel Perks, one of the next of kin. The other next of kin were cited by a decree to see proceedings. In May 1820, the several proctors who had appeared in the cause, declared they would proceed no further. On the termination of this suit, a decree was taken out by Messrs. Woolley and Gordon, bankers, at Birmingham, and creditors to the estate of the deceased ; calling upon all parties entitled in distribution to accept or refuse administration, with the will annexed of the goods of the deceased, or to shew cause why it should not be granted to them as creditors. Charles Green, one of the parties entitled in distribution, a private in the 11th of Dragoons, being with his regiment in India, the decree, according to the custom observed on such occasions, was served on one of the pillars of the Royal Exchange, and not returnable into Court till the 19th of this month.

*Lushington* moved the Court to dispense with the formality of awaiting the return of the process,

on the ground that the necessity for a representative to the deceased was urgent.

*Per Curiam,*

The instrument has been served on the Royal Exchange. By practice it has been usual to continue that by certificate until another Court day: but here the Court is applied to continue the certificate before the process is returnable, on the ground that it is a mere form, and that the person cited being in India it is impossible he can appear. It is possible that he may return before the time has expired—but the object is to give notice to his friends, and to any agent he may have in this country. Under the circumstances of this case, I would have granted a limited administration, if the necessity was pressing for carrying on proceedings in the Court of Chancery: but to accede to this motion would be quite breaking down the form of the process, which I should be unwilling to do;—as long as that form is preserved, the Court must not depart from the line of practice prescribed by it.

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Administration was afterwards applied for, limited to filing a bill in equity, and granted.

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1820.  
Trinity  
Term.

Woolley  
and  
Gordon  
v.  
Green.

1820.  
*Trinity*  
*Term.*  
June 10.

LYON *v.* FURNESS.

Answers on  
oath not to be  
dispensed  
with.

**J**UDGMENT.

SIR JOHN NICHOLL.

This is an application to grant probate on admission of the adverse party in acts of Court, with a view to saving the answers. The deceased died leaving a widow and a child;—the will is in his own handwriting—there is an attestation clause, but no witness to it;—the will has been propounded in an allegation which was discussed and admitted to proof. *Good v. Good* is cited as a precedent for the present application; and this is one of the many instances which point out the danger of the Court's relaxing its rules of practice—*Good's case*, however, is materially distinguished from this.—The widow admitted the facts in acts of Court: but proxies were exhibited from the daughter and the husband, the only persons who were interested in opposing the will. In this case the will may be beneficial to the widow, and adverse to the child. The answers of the widow upon oath may be something of a ground on which the Court can act, she having been present during part of the transaction.

I must require, especially in cases where the property is of sufficient value, that the answers upon oath may be brought in.

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## BARTHOLOMEW AND BROWN v. HENLEY.

1820.  
*Trinity*  
*Term.*  
June 10.

**J**UDGMENT.

SIR JOHN NICHOLL.

Three checks  
on a banker  
pronounced  
codicillary.

The party deceased is John Eyre Bartholomew. He died on the 22d of February 1819, leaving a widow, a son, and a daughter; he was possessed of a small real estate, and of personal property amounting from 7 to 10,000*l.*—He had lived apart from his wife, and had for several years before his death cohabited with a Miss Saunderson—he had a high regard for her—by his will of the 12th of November, 1813, he bequeathed to her the rent of two houses in Avery Row, all his household furniture, plate, money in his house, and a third in reversion of 2000*l.* in the event of the death of a son he had by her, before he should attain the age of 25 years.

There is a paper dated the 13th August, 1814, by which he gave her the improved rent of a house in Grosvenor-street—this is all in the deceased's handwriting, but not signed;—this is admitted to be a codicil.

A check is produced dated the 16th of January, 1817, for 250*l.*; another of the 4th of November, 1817, for 500*l.*; and nine months afterwards another check for 150*l.*;—corresponding entries to them are made in the check-book.

The first entry is "2808, Jan. 16, 1817. I give this check to Miss Eyre, for fear any thing should

820.  
Trinity  
Term.

JAR-  
THO-  
LOWEY  
and  
BROWN  
v.  
HENLEY.

# CASES DETERMINED IN THE

happen to me before I can make a codicil to my will, 250l." The second entry is "2544. I give this draft to Miss Eyre, being very ill, for fear any thing should happen that I should die, as it is my intention to make another will in her favour." The third is, "June 16—18, Miss Eyre. This draft to be paid from my bankers, in case I should die, 150l."

These several checks and entries are pleaded as codicillary—on the other side it is pleaded that they were only written during occasional illnesses, and have no effect; and that he wrote checks for others;—that he died suddenly, and that payment of the checks was not applied for till after his death.

The question for the Court to consider is, whether, under these circumstances, the instruments are a part of the testamentary disposition of the deceased; or whether they became void on his recovery; or whether he intended only one of them to operate; or whether each is to be added to the other.

Paper B. is in the form of a codicil; but these three are not so. Indeed it must be admitted that the papers are not in a testamentary form: but that is not necessary. Deeds of gifts, or letters if dispositive of property and to be consummated by death, have effect, although the deceased might not be aware that he had performed a testamentary act. Even if they are testamentary, the Court must enquire if they are contingent or cumulative.

This Court is often called upon in cases of this description to ascertain the real intentions of the testator. On the face of these papers I think the

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are testamentary ; they are directions as to the property after death ;—there is nothing to make me think them provisional. It cannot be denied *that* if he had died immediately after writing the *drafts*, they would have been valid. If they would *have* been good at that time, it is for the party *opposing* them to say when they ceased to be good ; the construction usually put on such instruments is this, “ in case I neglect the opportunity of making my will, I wish this to be a protection against my own negligence and omission.” This is the *only* safe construction which can be put. I do *not* consider a certain time imposed during which they are to be good, as the deceased has imposed no time himself.

In the next paper he states “ *for fear any thing should happen to me that I should die;*”—500*l.* This is much too large a sum for the purpose suggested of immediate supplies after death ;—this is an absolute benefit, not a condition the deceased imposed on himself. The third draft states “ *in case I should die* 150*l.* ;” this is not like a substitution, it is a much smaller benefit. The general principle is, that bequests are *primâ facie* to be taken cumulatively where they are on separate papers, unless they are revocatory of each other. It is observable also that the deceased was not then in a dangerous state ; from the very words of one of them, it was most clearly intended to be an addition to his will.

This is the view the Court is disposed to take of the papers. His mode of carrying his intentions into effect is singular : but the only point for my consideration is, whether he intended the party to

1820.  
*Trinity*  
*Term.*

BARTHO-  
LOMEW  
and  
BROWN  
v.  
HENLEY.

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have the benefit. Suppose a bank note in an envelope with a similar endorsement to this, no one can doubt what the effect would be—indeed I remember a case of that sort;—although cases are seldom precisely similar, the Court must endeavour in all of them to extract the intentions of the parties.

These observations arise on the face of the paper; the circumstances and evidence lead to the same conclusion. The deceased's wife had deserted him, and he was not on terms of civility with his son; he was desirous of marrying Miss Eyre, and had resorted to legal advice to ascertain whether he *could do so*. It is clear from the other testamentary papers, that he intended to increase the provision for Miss Eyre. In 1813 he made his will; in 1814 he wrote paper B.; in 1816 and 1817, new wills were begun; and it is clear from the contents of those papers that he intended a very considerable addition to Miss Eyre. It is not then improbable that he should from time to time do further acts in her favour; he spoke of her as extremely attentive to him during his illnesses and there is considerable probability that during these illnesses he intended to increase the benefit he destined for her.

These drafts on the death of the deceased are in the possession of Miss Eyre. It has been argued that the receipt of one draft must put an end to the preceding one, and so on; the one putting an end to the other: but there is nothing on the check themselves to shew that such was the opinion of the deceased.

With respect to the parol evidence, one witness Bell, a friend of the deceased's, has been examined, who deposes, that he had often heard the deceased speak in terms of regard for Miss Eyre. He states that the deceased referred to these checks, although he cannot fix the time of his doing so; and the Court cannot rely strongly on this: but where it is in concurrence with the other evidence, some reliance is to be placed on the statement.

On the whole I am bound to look to benefit intended; and although it has been done in an anomalous form, it is the duty of the Court to carry into effect the intentions of the deceased, and to consider these papers as a part of the will and codicils of the testator.

1820.
Trinity
Term.

BARTHOLO-
MEW
and
BROWN
v.
HENLEY.

PARKIN v. BAINBRIDGE.

JUDGMENT.

SIR JOHN NICHOLL.

The question before in this case was whether Mr. Bainbridge was to be considered as joint executor and residuary legatee. The case has since been before the Court of Chancery, and is now sent here to ascertain whether certain legacies are revoked.

Certainly these legacies were once a part of the

1820.
Trinity
Term.
June 11.

Legacies
drawn over by
a pencil hold-
en not to be
cancelled.

1820.
Trinity
Term.


PARKIN
v.
BAIN-
BRIDGE.

will,—pencil lines are drawn across them ;—the question is, whether they are drawn for cancellation or deliberation. Where the crossing of an instrument is in pencil, it is as valid if it is intended as a cancellation, as if it was in ink ; but it is more equivocal as to intention : persons are apt to make pencil marks for memoranda. Till I am better instructed, I shall hold them to be equivocal. I will reserve my opinion how I should decide, if no facts could be alleged on either side, till called upon for a decision upon such a case.

Here are circumstances which tend strongly to shew that the deceased considered these as acts for subsequent deliberation ;—on the face of the paper such is the presumption :—in some instances where he had first crossed them in pencil he afterwards crossed them in ink, he did not consider the pencil as the final alteration. Where he did not pursue the same mode, I infer that he had not decided on the revocation.

Another fact appearing on the face of the paper is, that he carries out and casts up the amount of the legacies. Where he has struck through the legacies with ink, he has altered the casting up, so as not to include the legacies so revoked : but the legacies struck through only in pencil are still included in the casting up of the total amount of the legacies.

The last ground is, that the Court has held, and it was admitted that the deceased did not mean to revoke by pencil marks, for the name of Mr. Bainbridge the executor and residuary legatee has been

drawn over by pencil : but it has been established by the averment of Mr. Bainbridge and Dr. Lettsom that the deceased did not consider Mr. Bainbridge's name erased ;—he continued to treat him as his executor, and directed his will to be delivered to him and Dr. Lettsom after his death ;—if Mr. Bainbridge was not revoked by these pencil-marks, what reason have I to suppose that the other legatees are ? The deceased's conduct leads to an opposite inference.

On the whole, I am of opinion that the deceased did not consider these legacies as revoked,—and that they are a part of the will of the deceased.

1820.
Trinity
Term.

PARKIN
v.
BAIN-
BRIDGE.

BUCKLE v. BUCKLE.

1820.
Trinity
Term.
June 20.

JUDGMENT.

SIR JOHN NICHOLL.

Lewis Buckle is the party deceased ;—in August, 1818, he wrote a testamentary paper which was found sealed up at his death ; and from the appearance it should seem that he did not intend it to be opened again.

Although the will is expressed in eccentric terms, there is nothing in it which indicates any want of capacity. But there is an attestation clause without witnesses, which raises a presumption against the

The presumption, arising from an attestation clause without witnesses, repelled.

1820.
Trinity
Term.



BUCKLE
v.
BUCKLE.

paper: yet it is a slight one, and the sealing up seems sufficiently to shew that he did not intend the paper to be witnessed. The hand-writing and finding are admitted:—I think I must conclude that it was the intention of the deceased that it should operate in its present form;—and I pronounce for the paper.

CONSISTORY COURT OF LONDON.

BRIGGS v. MORGAN.

1820.
Trinity
Term.
June 21.

THIS was a suit for nullity of marriage, brought by a man against his wife, by reason of incurable natural malformation, and bodily defects in her person. She was described in the libel as having been a widow when he married her.

It is competent to a man to bring a suit of nullity of marriage against a woman for natural malformation.

Arnold and Phillimore.

This suit is unprecedented; and the circumstance of the woman having been a widow raises such a presumption in her favour as cannot be averred against, unless it could have been pleaded that the former husband died too soon to complain: but that cannot be the case, for the cohabitation was of eighteen years' continuance. Added to this, the age is omitted to be stated. This might be sufficient of itself to protect the party from such an inquisition as she must submit to, should the libel be admitted to proof. The charge is not sufficiently specified;—if the idea is to be conveyed that she is *nimis arcta*, then the *triennalis cohabitatio* might be necessary, as it is in the case of frigidity; and it could not be competent to this man who has

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BRIGGS
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been married only one year and five months to institute the suit. Such was (a) Grimbaldeston's case. Only two cases within our recollection have been brought in these Courts by the woman, viz. Wilson v. Morris, (b) and Guest v. Guest; (c) and in the first of these the libel was rejected. Sir William Wynne said that none had been admitted in his memory, where the suit had been brought against the woman. C. 5. 7. Nov. 22. 6. Dcr. 2. 33. X. 4. 15. X. 2. 19. 4.

Jenner and Lushington, contra.

The *triennium* is not required where the case set up is that of the woman being *nimis arcta*. It is objected that she is a widow: but if the first husband acquiesced in her infirmity, the second is not bound to do the same. The sentence would not affect the former marriage—for it could be only voidable, and therefore cannot be enquired into after the death of one of the parties. Besides the acquiescence of the husband is contemplated in law; "*habeat ut sororem*." It is objected that her age has not been stated. The Court is not to presume that she is past the age of sexual intercourse: if she were, it is extraordinary that the husband should bring the suit. The woman may plead her age, or state it in the answers: but at all events she is not entitled to defend herself by the species of protest here resorted to. In *Greenstreet v. Comyns* (d) the inspectors reported that there was not such appa-

(a) Cons. 1777. Arches, 1779.

(b) Cons. of London, 1785.

(c) Cons. of London, May 20, 1820.

(d) Vol. II. p. 10.

rent incapacity as necessarily implied impotency; **yet**, on hearing the man's account of his own state, **they** believed it—and the Court pronounced for **the** nullity. There can be no natural reason why **there** should not be malformation in a woman as **well** as in a man, and consequently no reason why **the** one might not bring a suit of this description as **well** as the other.

Mascardus De Prob. 311. Brown, 2. 14. 16. Oughton, 215. Sanchez, 7. 107. Godolphin, 492. 2. 36.

JUDGMENT.

SIR WILLIAM SCOTT.

This suit is brought on the ground of alleged impotency.—Cases of this nature are said to be of rare occurrence; and that three only have been brought by the man within the last 60 years, and that these have been unsuccessful. A person need not be a profound physiologist to know how rarely the structure of the body is deficient for the purposes of our nature. Malformation is not common in our sex, and perhaps is still more uncommon in the other; and where it does exist, and is known to the parties, it naturally deters them from contracting marriage;—and where it is otherwise, there may be many reasons, some good and some bad, which may prevent them from applying to a Court of Law for redress. The possibility of the case is not denied: the topic is known to form no small extent of discussion in the canon law. Unless the possibility is denied, the right of complaining can hardly be denied to the husband: the rights and duties of both parties are co-equal, whe-

1820.
Trinity
Term.

BRIGGS
v.
MORGAN.

1820.
Trinity
Term.

 BRIGGS
 v.
 MORGAN.

ther the failure is on one side or the other. I am inclined to pay as little deference to the objection taken on the ground of the indelicacy of the proceedings.—Courts of Law are not invested with the powers of selection ; they must take the law as it is imposed on them. Courts of the highest jurisdiction must often go into cases of the most odious nature, where the proceeding is only for the punishment of the offender ;—here the claim is for a remedy, and the Court cannot refuse to entertain it on any fastidious notions of its own.

In *Harris v. Ball*, the judge here rejected the libel: but the Court of Delegates on solemn argument rejected that decision, and decided in favour of the complainant.

It has been said that the evidence must be such as would lead to no certain conclusion : but this is equally applicable to every case of the same description, and would go to shew it is wrong to give such a jurisdiction. The expectation of infirm evidence may induce greater caution : but is not to preclude parties from having recourse to those modes of proof which the law allows.

These general objections must be dismissed :—but it is said, there are particular objections,—*viz.* that the woman had been the wife of another man who had never complained. As to how long, or why he acquiesced, we are all in the dark ; a variety of reasons good or bad might have prevented him from complaining. In my view, however, the conduct of the first husband can form no more than a presumption ; it cannot be considered as an

estoppel to one man's grievance that another has not brought his forward.

Another objection taken is the age—which has not been stated in the libel. The woman may be advanced in life; and I do go the length of saying that private disappointment should be submitted to. The man is pleaded to be of sound health,—the age of the woman does not appear;—if he has married a woman of an advanced period of life, he must bear the consequence.

The great and final objection is, that the suit is premature, and that the *triennalis cohabitatio* is required—on all consideration of reason, and on examination of the authorities, I do not think that this rule applies to the present case; where the infirmity can be ascertained at once, this cannot be required. All the great authorities, ancient and modern, subscribe to this, which is the rule of reason, from the Digest of the canon law to Brown, and the oracles of our own practice. Godolphin and Oughton.

I am disposed therefore to admit the libel, but not at present; for I shall give the adverse party an opportunity of stating any thing in the way of protest which may induce the Court to abstain from allowing any further proceedings against her.

Affidavits were exhibited on both sides, and the effect of them argued at some length.

JUDGMENT.

SIR WILLIAM SCOTT.

This proceeding is brought by James Briggs, against Sarah Briggs his wife for a nullity of mar-

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riage, on account of incurable defect and natural malformation;—the marriage took place on the 16th of February 1819; she being a widow, and having lived with a former husband for eighteen years. It appears that James Briggs is in his forty-second year, that is, he will enter into his forty-third year in January next. She is some years older, being now in her fiftieth year, and in January next will enter into her fifty-first year.

No dissatisfaction was expressed on the part of the husband till March 1820;—the libel was brought in on the 2d of June 1820. The libel is short: it alleges the incapacity to exist; that it is natural and incurable, as will appear by the inspection of matrons and other lawful proofs; and prays that the marriage may be pronounced null and void. When the libel was first offered, the Court was disposed to consider, that unless something could be shewn in the way of protest on the part of the wife, it must be admitted. The subject itself is fair ground of complaint. Parties marry for offspring; for the enjoyment of each other's person. Natural malformation is of rare occurrence in either sex,—and is more rare in the female than in the male sex. Still instances do occur: sometimes they are without the knowledge of the party. Where it is with the knowledge, it is a gross fraud, and a grievous injury. In either of these cases the law provides a remedy; and it is the duty of the Court to supply the remedy on complaint being made.

It has been said that the modes resorted to for proof on these occasions are offensive to natural modesty:—but nature has provided no other

means ; and we must be under the necessity either of saying that all relief is denied, or of applying the means within our power. The Court must not sacrifice justice to notions of delicacy of its own.

If there is just reason either to suspect the truth of the statement, or to think the injury inconsiderable, the Court will hesitate before it descends to modes of proof which are painful.

The age is entitled to great consideration. The injury is very different from that which may occur in an earlier period of life, at a time of life when the passions are subdued, and marriage is contracted only for comfortable society. The exposure also of the person at an advanced stage of life may be felt with greater abhorrence, and complied with much more reluctance, than in the case of a younger person.

On considerations of this sort the Court desired the ages to be stated before the libel went to proof. The woman is near fifty, beyond the ordinary crisis of female life—little likely to have children ; and it does not appear that she had children by her former marriage. His age is less advanced ; he might form other expectations if he had married a younger woman. At any rate the fact standing thus, I must order the process of the Court to be executed upon a woman in her fifty-first year. I should feel much reluctance on this ground, if this were the only objection. The man is a little advanced beyond the *octavum lustrum*, approaching to the period when a philosopher has stated, that desires are no longer in a state of unsubdued provocation, but must be held to be under reasonable controul ; and

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he therefore may be fairly left to just reflection, and more placid gratifications.

But this is not the only objection. I see reason to suspect his sincerity.

First, from the lateness of the complaint ;—the libel is brought sixteen months after the marriage, it is a case to which the *triennalis cohabitatio* does not apply. Surely it did not require more than a twelvemonth to discover this defect.

In the next place with respect to the natural malformation. She swears most unreservedly that she had constantly carnal intercourse with her first husband for eighteen years till near the time of his death. This is confirmed most materially by the laundress, who washed their linen for many years, and who describes marks which might be denominated as certain *indicia* of real matrimonial connexion ; there cannot then be any natural malformation as he avers ; it must be then a case of supervening infirmity to which the most vigorous persons are subject in the decline of life, this would not be a case for the Court to interfere in.

Thirdly, he has brought forward a history to which no credit is due, *viz.* that she lived on bad terms with her former husband, the fact being that they lived on terms of the greatest harmony and affection, so much as to be an object of notice and commendation to their friends and neighbours. And it is confirmed by her husband having made a bequest of his whole property to her, leaving his own sister unprovided for, and having a family to maintain ; and though his sister applied to him to make a different disposition just before his death,

which he repelled with indignation, and expressed himself most strongly in favour of this woman.

The party proceeding here alleges likewise a cohabitation of the former husband with another woman ; as to which it appears that the cohabitation with this woman was before marriage, and broken off on that event taking place. The only witnesses to the contrary are the disappointed sister, and a person whom I suppose to be the attorney in the cause, who speaks to some allusions wholly overturned by other evidence in the case which proves that he lived happily with her, and remained true to his own spouse in life and in death.

On every ground I shall act improperly if I were to wade further in this business. He must find his remedy either elsewhere, or in his own patience. I shall not subject the woman to the process consequent on the admission of this libel, under such proof of the husband's insincerity ; and I dismiss this proceeding.

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PREROGATIVE COURT OF CANTERBURY.

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DEAN v. RUSSEL.

The wife of an executor an incompetent witness in a cause touching the validity of the will under which her husband is executor.

IN this cause the wife of one of the executors of a will which was contested was produced and examined as a witness. The executor had no legacy.

At the hearing of the cause the evidence of this witness was objected to, and the Court sustained the objection.

In the same case upon an application for the costs to be paid out of the estate of the testator,—

Per Curiam.

An application for the payment of costs out of the estate of the testator refused.

It is only under special circumstances that the Court directs costs to be paid out of the testator's estate;—indeed, it is only in modern times that it has found itself (a) authorised so to do. In this case the party might earlier have judged that it ought not to have proceeded so far in the cause—

(a) In *Henshaw and Hadfield v. Atkinson, and Atkinson Passey and Hemming*, Deleg. 1814, on an appeal from the Prerogative Court of Canterbury, the costs of the several parties in the cause in both Courts were decreed to be paid out of the estate of the testator. Judges Delegates—Mr. Justice HEAT, Mr. Justice LE BLANC, Mr. Baron WOOD, Dr. PARSON, and Dr. PHILLIMORE.

CONSISTORY COURT OF LONDON.

The Office of the Judge promoted by
GILBERT v. BUZZARD and BOYER.

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July 19, 25.

THIS was a proceeding by articles exhibited by John Gilbert, an inhabitant of the parish of St. Andrew's Holborn, against John Buzzard and William Boyer, the churchwardens, for refusing to permit the body of his wife to be interred in the churchyard or burying ground of the said parish. The articles set forth that Mary Gilbert died on the 2nd of March 1819, an inhabitant of the parish of St. Andrew's Holborn; that her body was soon after her death deposited in an iron coffin for interment; that due notice of the intended interment of the said body in the churchyard or burying ground of the parish was given, and the usual fees for such burial were paid: but that notwithstanding the same the churchwardens did by themselves, and other persons acting under their orders and directions, several times refuse to permit the said body so enclosed in an iron coffin to be interred in the churchyard or burying-ground of the

The use of iron in the structure of coffins, not unlawful:—but they are not to be admitted into churchyards on the same terms of pecuniary payment as coffins of ordinary wood.

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parish, *and did obstruct and prevent such interment thereof contrary to the laws and constitutions ecclesiastical of the realm*; and that in consequence of such obstruction the body in such coffin was deposited in the bone-house of the parish.

The articles went on to allege, that the coffin in which the body was deposited was *made of thin plates of wrought iron, one twelfth part of an inch in thickness*; and that it was *of less exterior dimensions than a single coffin made of wood for the same body* must necessarily have been; and that it was so constructed as to afford security against the removal of the corpse enclosed therein.

An allegation responsive to these articles was given in by the churchwardens in which the principal points made were, that the select vestry, which had the sole management of all affairs relating to the parish, had come to the resolution of refusing the admission of iron coffins into the burial grounds belonging to the parish; and had ordered the vestry clerk to communicate this order to the person conducting this funeral before the body was brought for interment. It moreover set forth "that the parish of St. Andrew's, Holborn, was large and populous, that there were according to the last census upwards of 30,000 inhabitants, which number had since increased;—that the annual number of burials exceeded upon an average of the last three years 800;—that besides the churchyard there were three burial grounds purchased by and belonging to the said parish;—that they are of small dimensions, and very nearly filled with the corpses of persons

buried therein ;—that if the majority only of the persons brought for interment in the said burial grounds were deposited in iron coffins, the said burial grounds would soon be rendered useless on account of the imperishable nature of the said iron coffins, and that it would not be possible to procure a sufficient quantity of ground for a new burial ground without going to a great distance, and then only at an enormous expense to the parish as well as to the individuals who had to bury their relatives, by their being obliged to take them so far from the parish for interment.

Arnold for Gilbert.

Various transactions have taken place with respect to this matter : several demands for burial were made and refused. A suit was then instituted against the incumbent for the purpose of trying this right : but the incumbent died, and that suit abated. Application was then made to the Court of King's Bench (a) for a *mandamus* ; which that

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(a) *The King v. Coleridge and Others.* On an application for a *mandamus* to compel the burial of the body,—

Abbott, C. J. I am of opinion that in this particular case the Court cannot interpose by granting a *mandamus*. It may be admitted for the purpose of the present question, that the right of sepulture is a common law right : but I am of opinion that the mode of burial is of ecclesiastical cognizance alone. If a clergyman should absolutely refuse to bury the body of a dead person brought for interment in the usual way, I am by no means prepared to say that this Court would not grant a *mandamus* to compel him to inter the body. But in so doing we should be acting in aid of the Ecclesiastical Court ; for that Court would compel the burial, although not in so speedy a

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Court refused on the ground that the suit was purely of ecclesiastical cognizance:—the present suit was next instituted against the Churchwar-

manner as by *mandamus*. In this case there has been no refusal to inter the body in the usual and ordinary mode:—the contest between the parties is, whether the officers of the parish shall be compelled to bury the body in an unusual and extraordinary manner. I am of opinion that it is a question proper for the decision of the Ecclesiastical Court, and not of this Court. I need not say, that in matters purely of ecclesiastical cognizance this Court does not interfere, as for instance in the case cited from * 5 T. R. the Court will not grant a *mandamus* to make a church-rate. I am therefore of opinion that this rule should be discharged with costs.

Bayley, J. I agree entirely with my Lord C. J. in the judgment which he has delivered;—the object of this application is to compel a burial in a specific manner. It is not for this Court to say that there shall be a specific mode of burial: but that is a matter purely for the consideration of the Ecclesiastical Court.

Holroyd, J. I am also of the same opinion:—the matter in dispute is merely as to the mode of burial; that I think is purely of ecclesiastical cognizance. In 3 Inst. 203. it is said “that in every sepulchre that hath a monument two things are to be considered, *viz.* the monument, and the sepulture, or burial of the dead. The burial of the *cadaver*, (that is, *caro data vermibus*,) is *nullius in bonis*, and belongs to ecclesiastical cognizance: but as to the monument, action is given, as hath been said, at the common law for defacing thereof.” It seems to me that the mode of burial is as much a matter of ecclesiastical cognizance as the prayers that are to be read, or the ceremonies that are to be used at the funeral. I therefore think that this rule should be discharged.

* *Rex v. The Churchwardens of St. Peter's, Thetford*, 5 T. R. 364.

dens;—the articles were admitted without opposition, and an allegation is now given in defence:—and the question is, whether there is a right on one side to insist upon interment in the material mentioned; and, on the other side, whether there is a right to refuse it. This allegation recites circumstances of alleged misconduct;—these tend to embarrass the question, and to lead away the attention of the Court from the main object; if admitted, they will lead to a long detail on the other side:—it cannot be argued, even should the misconduct be proved, that it would create a forfeiture of right;—and it would be disadvantageous to the Churchwardens to take this course, because they would obtain a decision on the particular case, and not on the general question.

The suit is brought avowedly for the purpose of arguing the right;—it is put in a criminal form, because, according to practice, that is the most convenient form;—no real punishment is intended

Best, J. It seems to me that this is a matter purely for the Ecclesiastical Court; and that of itself is a sufficient reason why this *mandamus* should not be granted. But considering this as an application to the discretion of the Court, I think that this *mandamus* ought not to go. The consequence of enforcing such a mode of burial would create great public inconvenience; for it is evident that in a few years the church-yard would be filled, and a great additional expense cast upon the parish in providing other places for the burial of the parishioners. I think therefore that this Court should not interfere in the exercise of its discretion to enforce a mode of burial calculated to produce such consequences.

The rule was discharged with costs.

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to be inflicted. The interment has been long deferred: part of our articles therefore is historical,—analogous to the leading article in a suit of divorce,—no other effect is intended: this part of them is only introductory to the subsequent matter;—the subsequent part of the plea is said to be useless and inadmissible,—and this raises the whole question.

It is the duty of an executor to take care of the funeral;—this discretion is variously exercised;—our ancestors buried in stone; we at this time often bury in lead, the outer coffin being of timber; and for this, timber of the most durable kind is selected. The executor here has chosen another material;—the advantage is that the body is better secured from removal by this mode. Attempts are frequently made to remove bodies;—it is the duty of the executor to provide against this;—it grows out of the best feelings of our nature;—the offence is an indictable matter. *K. v. Lynn. (a)*

The metal is intended to preserve bodies from violation after death: the dimensions of it will not produce greater inconveniences than those of an ordinary coffin;—it is only one twelfth of an inch in thickness. The objection goes to future inconvenience:—we apprehend that the arguments in favour of a more perishable material are not good. In the *first* place, the fact is not admitted that the article is more imperishable than other articles in constant use:—leaden coffins are not objected to,

—it is obvious that iron is not more imperishable than lead. Iron goes to rapid decay ; and it is stated, would decay as soon as wood.

Secondly, If the imperishable nature of the article is admitted as a ground of objection, where is the objection to stop ? It may next be made to the interment in lead. There can be no legal right to reject the material :—the church-yard and burial grounds belong to the parish, for the interment of the parishioners ;—they are vested by law in the incumbent and the parishioners. Every parishioner has generally a right to a place in the church-yard ;—he has no right to any particular spot ;—but when death and interment have taken place, ~~then~~ there is a severance of the common property, —the general right has become a particular right, —there is a legal appropriation of a legal right. **Inviolability** of sepulture is one of the dearest and ~~most~~ ancient rights of mankind ;—it is most deeply impressed on all our minds, and embodied in our common forms of speech. In the grave a man expects to be undisturbed ; it is his last home ; and ~~this~~, *ut requiescat in pace, usque ad resurrectionem*, (b) is considered by Lord Coke as a ground of the parishioners' duty of repair.

This appropriation is complete and perfect, till the time comes when appropriation cannot be maintained ;—that time is no matter of consideration for the present generation. The law which contemplates the appropriation cannot contemplate the extinction of that right,—the period is too remote.

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On the other hand, no such right exists as that claimed on the other side.

As to the inconvenience, it is one of the many other inconveniences arising from increased population :—this must be borne ; it will neither create nor destroy a legal right till it amounts to actual necessity.

Jenner on the same side.

The funeral service is to be preserved from all indignity :—no order of the Vestry can justify the Churchwardens, if they have acted illegally in obstructing and preventing the funeral.

Phillimore on the same side.

Per Curiam.

Has there not been a representation made that the parties could not get redress ? There has been no denial of justice here ;—this Court is always open. It is strange that the proceedings of Courts of Justice should be slandered because persons have taken upon themselves to act without informing themselves as to their proper course.

Swabey for the Churchwardens.

This is a case of the first impression—in all cemeteries we must revert to the persons at whose cost and charge the ground is purchased. There are, it seems, three burial grounds in the parish, which are small ;—from this material being imperishable, the ground would soon become useless, and it would be impossible that all the parishioners could find room for burial.

Per Curiam.

That is an important point :—it is asserted that iron consisting of laminæ perishes as soon as wood.

The first question is whether there is ground, for the inconvenience of which the parish complains.

Swabey. Cast-iron would certainly be imperishable. Allusion has been made to stone coffins: but the use of these can never have been frequent,—they have only been the depositaries of the bodies of persons of some note. Again, as to the lining of lead, that is not common;—the expense prevents its being common; and a higher fee is demanded for it. The objection is, Where would it stop? If the law does not expressly and in words prohibit the use of iron coffins; still, if a novel mode of burial is attempted, contrary to the wish of the parishioners generally, the Court will attend to their wishes;—not more is exacted in any case than an appropriation for burial:—on an application for a vault, the Court requires the consent of the parish. The words of the consecration of a church-yard generally apply to the separation of such a place for the purposes of sepulture only.

This case (c) underwent much discussion in the Court of King's Bench. The *mandamus* was refused, it being the unanimous opinion of the Judges that the mode of burying the dead was matter of Ecclesiastical cognizance;—it is quite clear, therefore, that this Court may make any regulations called for by the circumstances; and if the mode of burying in iron coffins were resorted to, it would be impossible for all the parishioners to be buried in the church-yard; and they would be driven at considerable

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(c) 2 Barnewall, 806.

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expense to purchase additional grounds out of the parish. The right of burial is like other rights; it is not to be so used as to injure others.

It has been objected that the appropriation of ground for each party for interment is for ever:—this is not so;—all that is required is, that the body be kept unmolested till it decays. In fine, the whole is under the discretion of the ordinary to make such arrangements under the circumstances as may be best for the public service.

Lushington and Dodson followed on the same side.

SIR WILLIAM SCOTT.

I shall admit this allegation for the mere purpose of trying the general question: but I do it on the distinct understanding, that neither in this nor in any other Court the question is to be considered as one in which costs can be given.

It has been said that these iron coffins are more durable than wood; a fact which I should wish to have shewn in the shortest way possible, not by allegation, but by affidavits.

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JUDGMENT.

SIR WILLIAM SCOTT.

This suit is brought by John Gilbert, parishioner of St. Andrew, Holborn, against John Buzzard and William Boyer, Churchwardens, for the offence of obstructing the interment of his wife, Mary Gilbert. The criminating articles state in substance, that she was a parishioner;—that she died 2d March, 1819. The body was deposited in an iron coffin, and proper notice given of the intended interment, on the 9th: but that the

Churchwardens prevented by force the burial taking place; and in consequence thereof, the body was deposited in the bone-house;—that such iron coffin takes up less space than a wooden coffin, and is so constructed as to prevent the corpse from being taken out. That again on the 14th April, in the present year, a written notice was given to the Rector, Churchwardens, and Sexton, of an intended funeral on the 18th, and a written answer returned by the Churchwardens that they would not permit it. That the demand for interment was made on the day mentioned; but the Churchwardens refused to permit the interment, unless the body was taken out of the iron coffin, and forbade any grave to be prepared.

The defensive allegation states in substance, that the account given by Gilbert misrepresents the transaction;—that nothing was said by Gilbert, or the undertaker about an iron coffin in the first inquiries, though then informed that the parish would not receive one: but Gilbert said it was to be of wood. He paid the usual fees, and then declared it to be of iron, refusing to take back the fees;—that a select vestry being assembled, and informed of it, passed a resolution not to admit the iron coffin; and a copy of such resolution was served upon the undertaker, who threatened the officer who brought it. That on March 9, a forcible entry was made into the burial-ground and church-yard, and a disturbance created: but the body was returned to the bone-house. That the parish is large and populous—30,000 parishioners, and increasing;—annual burials above 800, and

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increasing; three burial grounds, besides the church-yard, all nearly filled with corpses; that they would all soon be rendered useless by the introduction of iron coffins; that it is not possible to get a new burial ground, but at a great expense, and also at a great distance. And that their proceedings had been all guided and authorised by the select vestry, and by the parish at large.

It appears that the suit was begun under great mutual irritation, which is now properly subsided; and the parties have agreed to take the opinion of the Court on the dry question of right, without introducing with that question any imputation of the conduct on either side, or engrafting on it any demand of penalties to be inflicted, or of costs to be decreed. In this act of amnesty the Court entirely concurs; and therefore, forbears to repeat any of the wanderings into which this case has strayed since the transaction which gave it birth.

Before entering upon the immediate question, may not be totally useless or foreign to remark briefly, that the most ancient modes of disposing the remains of the dead recorded by history are by burial or burning, of which the former appears the more ancient. Many proofs of this occur in the Sacred History of the Patriarchal ages, in which places of sepulture appear to have been objects of anxious acquirement, and the use of them is distinctly and repeatedly recorded. The example of the Divine Founder of our religion in the immediate disposal of his own person, and those of his followers, has confirmed the indulgence of that natural feeling which appears to prevail against

the instant and entire dispersion of the body by fire; and has very generally established sepulture in the customary practice of Christian nations. Sir Thomas Brown, in his treatise on Urn-burial, thus expresses himself, (it is his quaint, but energetic manner:)—“Men have been fantastical in the singular contrivances of their corporal dissolution: but the soberest nations have rested in two ways, of simple inhumation and burning. That interment is of the elder date, the examples of Abraham and the Patriarchs are sufficient to illustrate. But Christians abhorred the way of obsequies by burning; and though they stuck not to give their bodies to be burnt in their lives, detested that mode after death; affecting rather a depositure than absumption, and properly submitting unto the sentence of God to return not unto ashes, but unto dust again.” But burning was not fully disused till Christianity was fully established, which gave the final extinction to the sepulchral bonfires. The mode of depositing in the earth has, however, itself varied in the practice of nations. “*Mihi quidem,*” says Cicero, “*anti-quissimum sepulturæ genus id videtur fuisse quo apud Xenophontem Cyrus utitur.*” That great man is made by that author to say, in his celebrated dying speech, “that he desired to be buried neither in gold nor in silver, nor in any thing else: but to be immediately returned to the earth. “What,” says he, “can be more blessed than to mix at once with that which produces and nourishes every thing excellent and beneficial to mankind?” There certainly, however, occurs very ancient mention, (in-

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deed the passage itself rather insinuates it indirectly) of sepulchral chests, or what we call coffins, in which the bodies being enclosed were deposited, so as not to come into immediate contact with the earth. It is recorded specially of the Patriarch Joseph, that when dead he was put into a coffin and embalmed; both of them, perhaps, marks of distinction to a person who had acquired other great and merited honours in that country. It is thought to be strongly intimated by several passages in the Sacred History, both Old and New, that the use of coffins, in our sense of that word, was made by the Jews. It is an opinion, that they were not in the use of the two polished nations of antiquity. It is some proof that they were not, that there is perhaps hardly in either of them a word exactly synonymous to the word *coffin*; the words in the Grecian language, usually adduced, referring rather to the *feretrum* or bier on which the body was conveyed, rather than to a chest in which it was enclosed and deposited; and the Roman terms are either of the like signification, or are mere general words, chests or repositories for any purposes (*arca* and *coculus*, &c.) without any funeral meaning, and without any final destinations of their depositions in the earth.

The practice of sepulture has also varied with respect to the places where it has been performed. In ancient times caves were in high request; mere private gardens or other demesnes of the families; enclosed spaces out of the walls of towns, or by the sides of roads; and, finally, in Christian countries, churches and church-yards, where the deceased could receive

the pious wish of the faithful who resorted thither in the various calls of public worship. In our own country, the practice of burying in churches is said to be anterior to that of burying in what are now called church-yards, but was reserved for persons of pre-eminent sanctity of life ;—men of less memorable merit were buried in enclosed places not connected with the sacred edifices themselves. But a constitution imported from Rome in 750, by an archbishop Cuthbert, took place at that time ; and churches were surrounded by church-yards, appropriated entirely to the burial of those who had in their lives continued to attend Divine service in those churches, and who now became entitled by law to render back into those places their remains into the earth, the common mother of mankind, without payment for the ground which they were to occupy, or for the pious offices which solemnized the acts of interment.

In what way the mortal remains are to be conveyed to their last abode, and there deposited, I do not find any positive rule of law or of religion that prescribes. The authority under which they exist is to be found in our manners rather than in our law. They have their origin in sentiments and suggestions of public decency and private respect : they are ratified by common usage and consent ;—and being attached to subjects of the gravest and most impressive kind, remain unaffected by private caprice and fancy amidst all the giddy revolutions that are perpetually varying the modes and fashions that belong to lighter circumstances in human life. That a body should be carried in a state of naked

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exposure would be a real offence to the living, as well as an apparent indignity to the dead. Some coverings have been deemed necessary in all civilized and Christian countries: but chests containing the bodies, and descending into the grave along with them, and there remaining in decay, do not plead the same degree of necessity, nor the same universal use. In the western part of Europe the use of sepulchral chests has been pretty general. An attempt was made in our own time by a European sovereign to abolish their use in his Italian dominions; much commended by some philosophers on the physical ground that the dissolution of bodies would be accelerated, and the virulence of the fermentation disarmed by the speedy abruption of all noxious particles into the surrounding soil. Whatever might be the truth of the theory, the measure was enforced by regulations prescribing that bodies of every age, and of both sexes, of all ranks and conditions, and of all species of mortal disease; and every form of death, however hideous and loathsome; should be nightly tumbled, naked and in the state they died, at the sound of a bell into a night-cart, and thence carried to a pit beyond the city walls, there to rot in one mass of undistinguished putrefaction. This system was so strongly encountered by the established habits, as well as by the natural feelings of a highly civilized and polished people, that it was deemed advisable at no great distance of time to bury the edict itself by a total revocation. In the Southern American establishments of the European nations coffins do not appear to be used.

In our country the use of coffins is extremely ancient. They are found of great apparent antiquity, of various forms, and of various materials,—of wood, of stone, of metals, of marble, and even of glass. (a) Coffins, says Dr. Johnson, are made of wood, and various other matters. From the original expense of some of these materials, or for the labour necessary for the preparation of them for this use, or for both, it is evident that several of them must have been occupied by persons who had filled the loftiest stations of life. In modern practice, chests, or coffins of wood or lead, or both, are commonly used for persons who can afford to pay for them. For persons of abject poverty, whom the civil law distinguishes by the title of the *miserabiliter egeni*, what is called a *shell* is used, and which I understand to be an imperfect coffin; and in very populous parishes is used successively for different individuals, unless charity, public or private, supplies them with a better. Persons dying at sea are, I believe, usually committed to the deep in their bed-clothes and hammock: but I am not aware that any of these are nominally and directly required. A statute (b) has required that the funeral vestment shall be made of wool; and coffins must by the same statute be lined with wool, but the use of it is not enjoined. I observe that in the funeral service of the Church of England there is no mention (and indeed, as I should rather collect, a studied avoidance of the mention) of coffins. It is throughout the whole of that ser-

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(a) See Gough's *Sepulchral Monuments*.

(b) 30 Car. II.


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vice the *corpse*, or the *body*. The officiating priest is to meet the *corpse* at the gate of the church-yard; at certain parts of the service dust is to be thrown, not upon the *coffin*, but upon the *body*. Certain parts of the service are to be recited whilst the *corpse* is making ready to be put into the grave. I observe likewise, that in old tables of parish fees a distinction is stated between coffined funerals and uncoffined funerals, in point of payment. There is one of 1627, quoted by Sir Henry Spelman in his *Tract De Sepulturâ*, where a certain sum is charged for coffined burials, and half the same sum for uncoffined burials, and expressly under those general heads of coffined and uncoffined funerals. From whence I draw this conclusion of fact, that uncoffined funerals were at that time by no means so unfrequent as not to require a particular notice and provision.

The argument, therefore, that rests the right of admission for particular coffins upon the naked right of the parishioner to be buried in his church-yard seems rather to stop short of what is requisite to be proved, *vis.* the right of being buried in a large chest or trunk of any material, metallic or other, that his executors may think fit. The law to be found in many of our authoritative text writers certainly says that a parishioner has a right to be buried in his own parish church-yard: but it is not quite so easy to find the rule in those authorities that gives him the right of burying a large chest or trunk along with himself. This is no part of his original abstract right, nor is it necessarily involved in it. That right, strictly taken, is to be returned to his

parent earth for dissolution, and to be carried there for that purpose in a decent and inoffensive manner;—when those purposes are answered, his rights are perhaps satisfied in the strict sense in which *his claims in the nature of absolute rights* can be supposed to extend. At the same time it is not to be denied that very natural and laudable feelings prompt to something beyond this; to the continuation of the frame of the body beyond its immediate consignment to the grave, and an indulgence of such feelings very naturally engrafts itself upon the original rights so as to appear inseparably with it in countries where the practice of it is habitually indulged. For however men may feel, or affect to feel, an indifference about the fate of their own mortal remains, few have firmness, or rather hardness of mind sufficient to contemplate without pain the total and immediate extinction of the remains of those who were justly dear to them ~~the~~ life. A feeling of this kind has been supposed to have caused the preference of burial to the process of burning; and has likewise given rise to extravagant means for preserving human remains for a period of time long after the term at which any memory of the individuals themselves, or any affection of their survivors, can be supposed to extend. Amongst such extravagances the use of coffins is not to be numbered;—they are temporary securities, certainly not of longer duration than is necessary for the protection of the bodies they contain from the ravages of the reptiles of the earth, if any such ravages are to be apprehended. In later ages and in populous cities other

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and more formidable invasions are to be apprehended,—more, I mean, committed by persons employed in furnishing subjects for dissection ;—an employment, which, whatever be its necessity, is certainly conducted not without lamentable violations of natural feelings, and occasionally of public decency itself.

It is particularly, I presume, with a view to prevent such spoliations of the dead, that the use of the coffins in question is pressed in the present application to the Court. The purpose of security against such spoliations is, as I understand, proposed to be effected by some ingenious mechanical contrivance, which prevents these iron coffins being opened, when once effectually closed. I don't find that any objection is made to the contrivance itself on the ground of inefficacy or any other. The objection is to the metal of which the coffin is composed, the metal of iron ; and I must say, that knowing of no rule of law that prescribes coffins, and certainly none that prescribes coffins of wood exclusively, and knowing that modern and frequent usage admits coffins of lead, a metal of a much more indestructible nature than iron, I find a difficulty in pronouncing that the use of this latter metal is clearly and universally unlawful in the structure of coffins, and that coffins so composed are inadmissible upon any terms whatever. These coffins, being composed of thin laminæ, occupy, I presume it is alleged, rather less space than those of wood itself—there is then no objection on that ground ; and the objection that they may be magnified to any inconvenient size seems to apply to

coffins constructed of this substance no more than to those of any other. But the claim on the part of these coffins is, (which is quarrelled with, though not distinctly avowed,) that they shall be admitted on the same terms of pecuniary payment as the ordinary wood. This claim cannot, I think, be reasonably maintained but under the support of one or other of these propositions, either that there is no difference in the duration of the coffin of wood and coffin of iron, or that the difference of duration, be it what it may, ought to make no difference in the terms of admission.

Upon the first of these points, the comparative duration, a wish was expressed by the Court, that it might be assisted by opinions obtained from persons more scientifically conversant in such subjects than I can describe myself to be: but being left to my own unassisted apprehensions on such a matter, I must confess that it was not without a violent revolt of every notion that I entertain, that I heard it rather indeed insinuated in argument, than directly asserted or maintained, that iron coffins would not keep a longer possession of the ground than those of wood. To me it appears, without any experimental knowledge that I can venture to claim, that upon all common theory it must be otherwise.—Rust is the process by which iron travels to its decomposition. If the iron coffin, deposited in the ground, contracts no rust at all from want of air or moisture, then it preserves its integrity unimpaired: but *contrà*, if from the moisture, of the soil in which it is deposited, or from the occasional access of a

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little air, it contracts rust—that rust, until it scales off, forms an external covering, which protects the interior parts, and retards the decomposition; whereas the decay of the external parts of the wood propagates inwardly its own corruption, and promotes and hastens the dissolution of the whole. It is the fault of the party complainant, if being left by him to judge of this matter without sufficient information, I judge amiss holding, that coffins of iron are much more, perhaps doubly more, durable than those of wood.

It being assumed that the Court is justified in holding this opinion upon the fact of comparative duration, the pretension of these coffins to be admitted on equal terms must resort to the other proposition, which declares that the difference of duration ought to make no difference in the terms of admission. Accordingly it has been argued, that the ground once given to the interment of a body is appropriated for ever to that body; that it is not only the *domus ultima*, but the *domus aeterna* of that tenant, who is never to be disturbed, be the condition of that tenant himself what it may. It is his for ever; and the insertion of any other body into that space, at any other time, however distant, is an unwarrantable intrusion. If these positions be true, the question of comparative duration sinks into utter insignificance.

In support of them it seems to be assumed, that the tenant himself is imperishable; for surely there cannot be an inextinguishable title, a perpetuity of possession, belonging to a perishable thing: but obstructed in a portion of it, by public authority.

the fact is, that "man" and "for ever" are terms quite incompatible in any state of his existence, dead or alive, in this world. The time must come when his posthumous remains must mingle with and compose a part of the soil in which they have been deposited. Precious embalmments and splendid monuments may preserve for centuries the remains of those who have filled the more commanding stations of human life: but the common lot of mankind furnishes them with no such means of conservation. With reference to men, the *domus æterna* is a mere flourish of rhetoric. The process of nature will resolve them into an intimate mixture with their kindred earth, and will furnish a place of repose for other occupants of the grave in succession. It is objected that no precise time can be fixed at which the mortal remains, and even the chest which contains them, shall undergo the complete process of dissolution; and it certainly cannot, being dependent upon circumstances that differ, upon difference of soils and exposure, of climate and seasons: but observation can ascertain it sufficiently for practical use. The experience of not many years is required to furnish a certainty sufficient for such purposes. Founded on these facts and considerations, the legal doctrine certainly is, and remains unaffected, that the common cemetery is not *res unius ætatis*, the exclusive property of one generation now departed; but is likewise the common property of the living, and of generations yet unborn, and subject only to temporary appropriation. There exists a right of succession in the whole, a right which can only be lawfully

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obstructed in a portion of it, by public authority that of the Ecclesiastical Magistrate, who gives occasionally an exclusive title in a part of the public cemetery to the succession of a single family, or to an individual who has a claim to such a distinction: but he does not do that without just consideration of its expediency; and a due attention to the objections of those who oppose such an alienation from the common use. Even a brick grave without such authority is an aggression upon the common freehold interest, and carries the pretensions of the dead to an extent that violates the just rights of the living.

If this view of the matter be just, all contrivances that, whether intentionally or not, prolong the time of dissolution beyond the period at which common local usage has fixed it, are acts of injustice, unless compensated for in one way or other. In country parishes where the population is small, and the cemeteries are large, it is a matter less worthy of consideration. More can be spared, and less is wanting. But in populous parishes, in large and crowded cities, the exclusive possession is unavoidably limited; for, unless limited, evils of formidable magnitude would take place. Church-yards cannot be made commensurate to a large and increasing population; the period of decay and dissolution does not arrive fast enough in the accustomed mode of depositing bodies in the earth, to evacuate the ground for the use of succeeding claimants. New cemeteries are to be purchased at an enormous expense to the parish, and to be used at an increased expense to the families, and at the inconvenience of their being compelled to resort to very

incommodious distances for attendance upon the offices of interment. Three additional burial grounds in this very parish have been so bought. This is the known progress of things in their ordinary course ; and if to this is to be added the general introduction of a new mode of interment, which is to insure to the bodies a much longer possession, the evil will be intolerable. A comparatively small portion of the dead will shoulder out the living and their posterity. The whole environs of this metropolis must be surrounded by a circumvallation of churchyards, perpetually enlarging, by becoming themselves surcharged with bodies ; if indeed land owners can be found willing to divert their ground from the beneficial uses of the living to the barren preservation of the dead, contrary to the humane maxim quoted by Tully from *Plato's Republic*, *Quæ terra fruges ferre, et, ut mater, cibos suppeditare, possit, eam ne quis nobis minuat neve vivus neve mortuus.* (a)

If therefore, these iron coffins are to bring additional charges upon parishes, they ought to bring

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(a) De sepulcris dicit (Plato) hæc:—vetat ex agro culto, neve, qui coli possit ullam partem sumi sepulcro, sed quæ natura agri tantummodo efficere possit, ut mortuorum corpora sine detrimento vivorum recipiat, ea potissimum ut compleatur: —quæ terra fruges ferre, et, ut mater cibos suppeditare possit, eam ne quis nobis minuat, neve vivus, neve mortuus. Extrui vetat sepulcrum altius quam quod quinque diebus homines quinque absolverint, nec e lapide excitari plus, nec imponi, quam quod capiat laudem mortui incisam quatuor herois versibus, quos longos appellat Ennius.

CICERO *De Leg.* lib. ii. s. 27.

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with them a proportionate compensation ; upon all common principles of estimated value, one must pay for the longer lease which you actually take of the ground. And what is the exception to be pleaded for iron ? If you wish to protect your deceased relative from the spoliators of the dead, by additional securities, which will press upon the convenience of the parish, we do not blame the purpose, nor reject the measure : but it is you, and not the parish, who must pay for that purpose. I am aware (as I have already hinted) that very ancient canons forbid the taking of money for interment, upon the notion that consecrated grounds were among the *res sacræ* ; and that money payments for them were, therefore, acts of a demoniacal complexion. But this has not been the way of considering that matter since the Reformation, (for the practice certainly goes back at least as far ;) it appears founded upon reasonable considerations, and is subjected to the proper control of an authority of inspection. To inland and populous parishes, where funerals are very frequent, the expense of keeping church-yards in an orderly and seemly condition is not small ; and that of purchasing new church-yards, when the old ones are likely to become surcharged, is extremely oppressive. To answer such charges, both certain and contingent, it is surely not unreasonable that the actual use should contribute when it is called for. At the same time parishes are not left to carve for themselves in imposing these rates ; they are submitted to the examination of the ecclesiastical magistrate, the ordinary, who exercises his judgment, and expresses the result by a confirms—

tion of the propriety, pronounced in terms of very guarded caution. It is difficult to say where that authority could be more properly lodged, or more conveniently exercised.

Having already declared sufficiently my opinion on the question of right, it remains only that I should direct the parish to exhibit a table of burial fees for the consideration of the ordinary. It will be for their own consideration in the first instance how far these coffins should be placed upon the same footing as those of lead. It is certain that they occupy less room, and that they are more temporary in duration: but it is to be remembered, that being much more accessible in point of original expense, and, therefore, likely to be much more numerous, they are on that account more likely to convert these cemeteries into mines of iron, than there is any hazard of their being converted into mines of lead. It may be said that this will operate indirectly as a prohibition in populous parishes and crowded church-yards; and if it should have that effect, it is still better than that the parish should be robbed of the fair and convenient use of their public cemetery. Patent rights (and on which it seems these coffins are constructed) must be held by the same tenure as all other rights, *ita utere jure tuo, alienum ne ledas*; they must not infringe upon rights more ancient, more public, and such as this Court is peculiarly bound to protect. I would recommend in the mean time that the body should be committed to the grave without further obstruction: but without prejudice to the present question, or to the rights of the parish. No pro-

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hibitory resolutions existed at the time of the death; and I willingly lay hold of that circumstance to recommend a measure of peace and charity to the living and to the dead.

I shall admit affidavits to be brought in on both sides, before confirming the tables of burial fees.

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JUDGMENT.

SIR WILLIAM SCOTT.

From the former discussion the Court came to the general determination of the legal question and decided, that if iron coffins were more durable than those of wood, a higher payment ought to be made to the parish for their longer duration in the ground.

The question of longer duration remained to be controverted; and the expectation perhaps was to be indulged, that there should not be difference of opinion, or that opinion on either side should reach exactness. The influence of various causes on both these substances must be tried, and such experiments cannot be had in time to guide any decision. The matter, therefore, must rest upon opinions, and the facts which have been adduced.

the declared opinion

to decide another question, that of the comparative skill of the different professors. The balance of members is on the side of the greater durability of iron ;—therefore, *primâ facie*, the balance of authority is that way. I may perhaps be thought unduly influenced by my own opinions, if I say that the statements of Mr. Brande, who fixes the proportion of durability of iron to wood as three to one, in which he is confirmed by Mr. Aikin and two other persons, find a readier admission to my mind than those of their opponents.—A test has been suggested to me by a person well (a) informed on such subjects ;—arising from the casual discovery of both substances found in contact with the soil at very distant periods of time ; sometimes separated from, sometimes in conjunction with, it. —The soil may be in three states—first, where the ground has been dry at all times,—both substances in such a state seem entitled to longevity ;—rust does not affect one, or rottenness the other. The *Ægyptian* mummies, made, as it is supposed, of the sycamore wood of the country,—and the *immortale lignum*, as the larch is termed by Pliny. But the wooden coffin of Charles the First is described as much decayed, though enclosed in a leaden coffin carefully soldered up.

*Secondly*, Where either of these have been permanently covered with water, salt or fresh, as anchors fished up from the bottom of the sea, where they have been known to have laid for ages. The keys of Lochleven castle had suffered very little

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(a) Mr. Hatchett, an eminent chemist.

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injury when they were lately found, after having been covered with water two hundred and fifty years. Manufactured wood is said to resist the effect of water less perfectly: but the Conway stakes in the Thames, said to be fixed by Cæsar, and the piers of Trajan's bridge over the Danube, afford strong proofs of the durability of wood under certain circumstances.

The *third* state applies more directly to this question. Where the substances are subject to alternate damp and dry—weapons with metallic heads, belts, sword blades, and other instruments found in burrows, can be easily recovered to their ancient use, while no particle of the wood remains. Numerous instances of this kind are to be found in the British Archæologia.

An affidavit has been made by the patentee, signed by three persons, respecting an iron coffin buried in the churchyard of St. Giles's, Cripple-gate, which was soon afterwards taken up covered with rust. I cannot infer much from this single instance, produced, perhaps, by singularity of circumstances;—the common practice of having the ends of park palings shod with iron may be deemed a sufficient counterpoise to this solitary fact.

Upon these four species of evidence,—my own opinion,—what appears to be the common apprehension,—the preponderating opinions of men of science,—and of discoveries I have mentioned,—I am called upon to act. If succeeding experience shall shew my conclusions to be erroneous, it will be for the remedial justice of this Court hereafter to revise and correct the decision.

The remaining question then is as to the proper *quantum* of increased taxation.—I am satisfied that no general measure of *quantum* can be laid down—not even such a one as would be applicable to the several parishes of this town;—the size of the churchyard in proportion to the number of inhabitants;—the possibility of enlargement;—the means of procuring other ground,—make a regulation which would apply to this parish applicable to others only with a due consideration of circumstances. In St. Dunstan's in the West they have demanded 25*l.*; that is a populous parish, with a small churchyard, in the heart and most busy part of this Metropolis. There is less in appearance to justify the demand of the parish of Islington for 21*l.*, though at the same time I cannot say that there may not be reasons which may justify it.

Upon this charge of St. Andrew's, Holborn, an ingenious calculation has been made;—assuming the facts to turn out as stated, I should suspect it would prove a fallacious one. The basis of it, that the graves should be sunk fifteen feet below the ground;—if parishes could act conveniently on such a calculation it would prevent the necessity of buying new cemeteries.

An objection has been taken to the application of the sum charged to the incumbent and the churchwardens: but the present party has no right to look into that question, or to quarrel with the public uses to which it has been applied by the parish. The incumbent by the general law has the freehold by acquiescence, confirmed by usage:—parishes in this town have acquired common rights

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with the incumbent. The sum charged is not specifically for an iron coffin, but generally for a metallic coffin, and not improperly ;—for the patent allows the use of any metal,—precious metals are excluded from their intrinsic value : but the Court cannot take upon itself to assign limits to the contrivance which human ingenuity may exercise over different metals and their mixtures. From the general words of the patent it appears that the patentee had various metals and their mixtures in his contemplation : the coffins cannot be examined at the time of sepulture ; they may be varnished or tinned, and not betray outwardly the metal of which they are made.

The state of this parish is also gravely to be considered, in the midst of this great town, with a large and increasing population, both of living and dead ;—four cemeteries are already filled with bodies, and there is a crying demand for more sepulchral space. It is no fit subject for an experiment, even according to the opinion of those who are most favourable to the introduction of iron coffins, there being these inconveniencies on one side, —the patentee must postpone his greater harvest of gain till it is found that the novelty can be safely introduced ;—apprehensions are raised which must be treated with tenderness, let experience shew whether they are entertained without foundation. If they are so, it is to be hoped parishes will do their duty ; if they do not, Courts must endeavour to do theirs : at present I cannot allow the claim of admission generally to be supported.

The sum proposed is 10*l.* ; it seems the Parish





**THE TABLE OF DUES,**  
**FOR THE PARISH OF SAINT ANDREW, HOLBORN, IN THE CITY OF LONDON AND COUNTY OF MIDDLESEX;**  
 SETTLED AND APPOINTED  
*At a Meeting of the Vestrymen of the said Parish, held in the Vestry Room of the Church, on Wednesday, the 22d Day of November, 1820.*  
**FOR BURIAL, MARRIAGE, &c.**  
*Confirmed by Judge, May 18, 1821.]*

FOR BURIAL.  
 For Parishioners.

|                 | Church Vault.     |                   | Church Yards.      |                   | Upper New Ground.  |                   | Lower New Ground.  |                   | Shoe Lane Ground. |                   |
|-----------------|-------------------|-------------------|--------------------|-------------------|--------------------|-------------------|--------------------|-------------------|-------------------|-------------------|
|                 | Grown Person.     | Child.            | Grown Person.      | Child.            | Grown Person.      | Child.            | Grown Person.      | Child.            | Grown Person.     | Child.            |
| Rector .....    | £. s. d.<br>1 2 6 | £. s. d.<br>1 2 6 | £. s. d.<br>0 13 6 | £. s. d.<br>0 8 0 | £. s. d.<br>0 18 4 | £. s. d.<br>0 9 4 | £. s. d.<br>0 12 0 | £. s. d.<br>0 7 0 | £. s. d.<br>0 5 0 | £. s. d.<br>0 5 0 |
| Churchwarden .. | 2 15 6            | 1 7 6             | 0 5 4              | 0 5 0             | 0 6 6              | 0 6 2             | 0 4 0              | 0 3 8             | 0 1 6             | 0 1 6             |
| Clerk .....     | 0 4 10            | 0 4 10            | 0 3 2              | 0 1 4             | 0 4 10             | 0 1 4             | 0 2 8              | 0 1 0             | 0 1 6             | 0 1 4             |
| Sexton .....    | 0 5 8             | 0 5 8             | 0 1 6              | 0 1 2             | 0 2 6              | 0 1 2             | 0 1 6              | 0 1 2             | 0 1 6             | 0 1 2             |
| Gravedigger ... | 0 1 6             | 0 1 6             | 0 1 6              | 0 1 0             | 0 1 6              | 0 1 0             | 0 1 6              | 0 1 0             | 0 2 0             | 0 1 6             |
|                 | 4 10 0            | 3 2 0             | 1 5 0              | 0 16 6            | 1 13 8             | 0 19 0            | 1 1 8              | 0 13 10           | 0 11 6            | 0 10 6            |

For Non-Parishioners.

|                                                          |      |           |      |           |     |           |     |                                                                  |            |
|----------------------------------------------------------|------|-----------|------|-----------|-----|-----------|-----|------------------------------------------------------------------|------------|
| Sexton ..                                                | 2 6  | Sexton .. | 1 0  | Sexton .. | 0 2 | Sexton .. | 0 2 | Clerk ..                                                         | 0 0        |
|                                                          | 10 6 |           | 10 6 |           | 1 6 |           | 1 6 |                                                                  | 0 0        |
| For Extract from the Register<br>Inspecting the Register |      |           |      |           |     |           |     | For searching the Register for one Year<br>Every subsequent Year | 1 0<br>0 4 |

of St. George's, Hanover-Square, a peculiarly well governed parish, has demanded this sum. I might myself, if called upon in the first instance, have fixed it somewhat lower—at 5*l.* or 6*l.* : but I am not now inclined to lessen what has been claimed.

I hesitate more on the condition of making the graves fifteen feet deep. I doubt whether it would be right or prudent so to do ;—whether, if the iron coffin is admitted, it should not be taken on the same condition as the other coffins. The condition proposed will create expense,—may let in water which may affect other coffins ; and, what is of more importance, may prevent all knowledge as to the decay of these iron coffins, and thereby there can be no experience of their decay or otherwise : but the question of their durability will be placed in the hands of the other party.—I wish this point to be reconsidered ; and when that is done, I shall be prepared to affirm this assessment.

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The judge signed the table of fees, of which the annexed is a copy.

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May 18.

## ARCHES COURT OF CANTERBURY.

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Nov. 11.

BUTTER v. ROBSON and HOLLAND.

In a libel for a legacy, the averment of the legacy should be in the exact words of the will.

**A** LIBEL was given by Joseph Butter against Richard Bateman Robson, and Richard Holland, the executors of Henry Holland, for a legacy bequeathed to him in the following terms:—"To each and every of my servants  
"and clerks who shall have lived with me or been  
"in my service for three years two years' salary  
"or wages, at the rate of such salary or wages as  
"they have previously received."

*Swabey in opposition to the libel.*

The interest of the legatee is not set out with such distinctness as it ought to have been. (a) It has been laid down in a case in Vernon's Reports, that a steward of a court baron, who officiated also for other persons, was not to be considered in the light of a servant attached to a particular individual. It may happen that the party proceeding here served Mr. Holland in some such vague and temporary capacity, and then it would be in the power of the executor to resist the demand ;—which it would be

(a) *Townshend et al. versus Windham v. Robinson*, 2 Vernon 546.

impossible to do under the present plea, which is in the general terms of the will, without specifying the particular capacity in which he had served.

*Adams contra.*

It is unnecessary to plead more specifically ; the words pleaded are the words of the will ; it might be difficult to give a description of the legatee's services under any specific head, as the testator employed many clerks or servants in a sort of intermediate capacity.

JUDGMENT.

SIR JOHN NICHOLL.

In a common libel it is not only unnecessary to go into a minute description, but it is more regular and proper to follow in the averment the exact words of the will. I think the averment in this action is exactly within the words of the will ; and it lies on the other party to shew that the claimant, though he was in the deceased's service, was not within the words of the will ;—this may be alleged in the way of answer : but I am of opinion that it is properly pleaded here, and I shall admit the libel.

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Libel admitted.

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*Michaelmas*  
*Term.*

BUTTER  
v.  
ROBSON.

## PREROGATIVE COURT OF CANTERBURY.

1820.  
Michaelmas  
Term.  
Nov. 22.

CHAPMAN v. WHITBY AND PARSON.

The admission of an allegation exceptive to the general character of a witness suspended till the final hearing of the cause.

**A**N allegation offered to the Court excepting to the character of William Day:—pleaded that “William Day, of Birdcage Fields, Stoke Newington, in the county of Middlesex, a witness produced, sworn, and examined in this cause on the part and behalf of John Whitby and Jemima Parson (widow of William Parson) two of the parties in this cause, was and is a person of bad character, fame, and reputation, and one to whom no faith or credit in the law whatsoever is or ought to be given; for that he is a person who for the sake of gain or reward, or other benefit to himself, might be induced to depose falsely and untruly.”

*Phillimore and J. Addams against the admission of the allegation.*


This is an unfortunate case which has been two years in litigation, and in which the property does not amount to 1800*l*. Generally speaking, an allegation exceptive to general character may be admitted at any time before publication; and publication has not yet passed in this case: but the Court has always a discretion to exercise in questions of this description, and under the particular circumstances of this case such an allega-

tion is inadmissible. This witness was vouched to certain facts in a plea given in by us so long ago as in May 1819. In the second article of that allegation it was pleaded, "*that the deceased took up his abode at Clapton with William Day and Elizabeth his wife, which said William Day then followed the business of a jobbing gardener, but had been heretofore, together with his wife, employed as servants in Brook House, and that James Chapman, the other party in this cause, had been likewise employed as a farming man at Brook House ; and thereby they, the deceased, the said William and Elizabeth Day and James Chapman, had become acquainted with each other.*"

William Day has been examined on this, as well as on most of the other articles of that allegation, and cross-examined by the adverse party. Moreover, in February of the present year the adverse party gave a responsive allegation, contradicting the facts pleaded by us, but yet raising no question as to the character of William Day.—They have therefore lost their opportunity ; and it is now too late, when publication is about to be prayed, and the cause is ready for hearing, to introduce a general objection to the character of a witness, which might have been taken so much more advantageously for all parties, and for the general purposes of justice, at an earlier stage of the proceedings.

In *Raybould v. Raybould*, the Court rejected an exceptive allegation when publication had passed : but the depositions had not been seen.

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Term.  
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WHITE  
and  
PARSON.

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 v.  
 WHITEY  
 and  
 PARSON.

*Dodson contra,*

Maintained that they had a right to give in an allegation exceptive to general character at any period before publication had passed in the cause.—In *Raybould v. Raybould* publication had passed, and that circumstance constituted the distinction between the two cases.

JUDGMENT.

SIR JOHN NICHOLL.

The circumstances of this case are such, that the Court will not be disposed to admit unnecessarily any matter which is not essential to the purposes of justice; the property is small, and the parties have gone into great length of pleading.

It is very true, that in this Court the general character of a witness may be gone into before publication, I take this to be the general rule: but after publication it cannot.

An exceptive allegation before publication stands on the same footing with any other facts in the case.—There may be reasons why it should be offered in a late stage: but I apprehend the correct rule to be, where general character is objected to;—the facts as to the general character of the witnesses ought to be pleaded to, when the responsive allegation is given in:—extreme inconvenience would otherwise arise from the protraction of causes; every cause might, by the introduction of such an allegation as this, be extended six or eight months beyond its just limits. I apprehend where a party has any thing to allege against the character of a witness, he ought to introduce it in the



general allegation, unless he can shew that the facts have lately come to his knowledge.

There never was a case to which these observations could apply more strongly than to this.—An allegation was given in by the party opposing the will, in May, 1819. Day was vouched to many facts pleaded in it; he was produced as a witness, and subject to the interrogatories of the other party.—In February 1820, the other party gave in a responsive allegation, in which not a word is said as to the character of Day. That was the right time to have objected to his character; and, unless there is some new ground, the subsequent production of other unexceptionable witnesses is no reason for not having so done.

I should not consult the general principles of the practice of the Court, or of real justice, if I admitted the executors now to introduce this allegation.

Looking to the general circumstances of this case, I do not think that witnesses now produced to the general character of this man would do much to satisfy the Court as to the weight it ought to give to his testimony. Having been produced to all the circumstances of the case, he must have undergone a very full examination on the allegation, and upon the interrogatories; and unless the Court could form its judgment from the depositions, it would be difficult to do so from the testimony of three or four witnesses to general character.

I am unwilling, however, to reject the allegation entirely. I shall therefore do that which I did

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in a former case; (a) I shall allow the admission of this allegation to stand over till the final hearing of this cause.—If the evidence shall then be so nicely balanced that the Court should be in doubt, as the cause is never concluded against the judge, I may allow it to go to proof.

I shall allow the allegation to stand over, reserving the further consideration of it till the final hearing of the cause.

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*Michaelmas*  
*Term.*  
Nov. 22.

WEST AND SMITH v. WILLBY.

An administration granted to creditors in preference to a grandmother who had been appointed guardian to minors; and having renounced the administration, had prayed to be re-appointed before the administration passed the seal.

**WILLIAM** Sampton, of Oxenden in the county of Northampton, died on the 18th of August, 1820, leaving a widow and three children, the eldest of whom was not more than thirteen years of age. The widow died five days after her husband, and without taking out any letters of administration to his effects.

The children elected Elizabeth Willby, their maternal grandmother, to be their guardian, for the purpose of renouncing their right to letters of administration of the goods of their deceased father; which guardianship she accepted, and having formally renounced her right to the letters of administration, William West and Joseph Smith, two creditors, were on the 1st of September, sworn admi-

(a) *Salmon v. Cromwell and Others*, p. 220.

nistrators, and entered into the usual bonds:—but on the 4th of September, before the administration had passed the seal of the Prerogative Court, a caveat was entered against it; and Austen appeared as proctor for Elizabeth Willby, and alleged that her grandchildren had retracted the election heretofore made of their grandmother to be their curatrix or guardian for the purpose of renouncing their right to the letters of administration of the goods of the deceased, and had re-elected the said Elizabeth Willby to be their curatrix or guardian for the purpose of taking upon her the letters of administration for their use and benefit until one of them should attain the age of twenty-one years; and that Elizabeth Willby herself had expressly retracted the renunciation before made by her as guardian to the minors, of the letters of administration, and applied for the letters of administration to be granted to her.

*Fox*, proctor for the creditors, prayed to be heard on his petition against the grant of this administration;—and he was assigned to be heard on the caveat day in October. On that day (*i. e.* the 3d of October) he alleged he had delivered his act to *Austen*, who was assigned to return the same to *Fox* on the first session of Michaelmas Term (*viz.* 6th of November); the assignation was continued till the next Court. On the 11th of November notice was given to *Austen*, that unless he delivered his reply to the act on petition on the second session, application would be made to the Court to hear the cause *ex parte* on *Fox's* act already delivered.

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*Term.*  
WEST  
and  
SMITH  
v.  
WILBY.

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On the second session of Michaelmas Term (*vis.* the 15th of November) Fox alleged that Austen had not returned the act; and prayed leave to bring in a copy of it, and that the judge would hear the same *ex parte*; and the Court gave leave accordingly, and assigned to hear the cause on the next Court day.

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*Phillimore* moved the Court to allow the act on petition given in by Fox, and the evidence adduced in support of it, to be read, in order to found upon it a notice that the administration should be granted to William West and Joseph Smith, the two creditors who had been already sworn as administrators, and also give the usual bonds for the due performance of their functions.

*Dodson, contra*, contended,

That the next of kin had a full right to claim such a re-appointment as this;—that it was the daily practice of the office to grant such, nor could the grandmother be concluded by the hasty act of renunciation;—he asserted that, she did it, as he could prove, under threats, and undue means of intimidation; that he could prove also that the estate was not, as has been stated, insolvent. Under this statement, he prayed to be allowed to reply to the act given in.

*Phillimore* in reply.

*Per Curiam.*

No reason has been assigned why the act has not been replied to long ago. This delay must be accounted for, or the case must be heard upon an *ex parte* statement of facts. If you go upon the merits of the case, and stand upon the right of retracting

I am willing to hear you on that point. And then the *ex parte* proceedings on the other side are admitted ; or I am willing under the strong averments that have been made of threats and undue influence, and also as to the solvency of the estate, to give further time to reply to the act or petition, and to bring affidavits in support of the averments : but if I do this, it is at the risk of costs which I shall certainly give against them if their averments are not proved.

*Dodson* elected to have further time to reply to the act.

*Per Curiam.*

I expect not merely a general denial of the insolvency, but a specific statement of the assets ; the debt is asserted on the other side to be upwards of 700*l.*, and the assets not to amount to more than 170*l.* It is to be remembered that the party may involve herself in costs, though the question of right may be in her favour.

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The cause came on for hearing on the act on Dec. 11.
petition, and the affidavits which had been adduced in support of it.—On the part of Mrs. Wilby, it was alleged that she had executed the proxy of renunciation under threats and intimidations ;—That by law she had a right to retract a proxy of renunciation at any time before the administration passed the seal ;—that the estate was not insolvent ;—that William West and Joseph Smith took means for turning the deceased's family out of the house, by getting possession of the licence, and advertising an immediate sale of the effects ;—and that

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in order to prevent the ruinous consequences to the deceased's children from such proceedings, and in compliance with the wishes of several of the creditors, Thomas Wade and Richard Burton had obtained letters of administration from the proper Court within the diocese of Peterborough.

These facts were all contradicted by the creditors, except the circumstance of Wade and Burton having obtained the letters of administration from the Court at Northampton; in answer to which it was stated that they were neither of them creditors of the deceased, and that at the time they obtained the said letters of administration they knew that the deceased had left *bona notabilia* to found the jurisdiction of the Prerogative Court of Canterbury.

Phillimore, for the creditors.

Dodson contra.

JUDGMENT.

SIR JOHN NICHOLL.

The facts of this case have been set forth in an act on petition, in which it is alleged that William Sampton died on the 18th of August insolvent; that West and Smith are creditors; that his widow died on the 15th of August, that his children are minors; that the minors elected Elizabeth Willby for their guardian for the purpose of renouncing the administration—she accordingly executed a proxy of renunciation.—West and Smith were sworn administrators, and gave bond.—On these grounds they pray the administration may pass the Seal.—Application was made to hear this case *ex parte* on account of the delay on the other side—and that application was acceded to: but upon

its being stated that new proxies were executed by the minors to re-appoint their grandmother, that she was ready to act, that her renunciation had been obtained by threats and intimidations, that the estate was solvent, permission was given them to answer the act or petition. To this a reply was put in by the other parties contradicting all the material averments.—This is the general substance of the statement of facts.—

The *first* question is, whether a renunciation once made may be retracted before the administration has passed the Seal, and I am of opinion that it may.

The next question is whether the Court is bound to allow it to be retracted ; and I am of opinion that this depends upon the circumstances of the case.—Mrs. Willby does not come here to claim in her own right, but as appointed by the next of kin.—She only claims the administration *durante minoritate*;—she is not within the statute;—it has been so laid down in a variety of cases;—the same rule has been laid down in Courts of Westminster Hall, *King v. Bettesworth*. (a) There are instances within my own memory where the Court has granted to persons not guardians of the minors the administration, and refused to grant it to the person nominated by them. In *Lovell and Brady v. Cox*, Lovell and Brady were appointed trustees by the deceased, and his heir Anne Cox was executrix and residuary legatee. She was a minor ; the father claimed the administration *pendente minoritate*. The Court expressly held it had a discretionary power, refused it

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(a) 2 Strange 956.

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to him, and gave it to the trustees, the parties in the cause.

There is an old case, *Hawksworth and Simpson v. Warner*, (b) which more directly falls under the circumstances of this case. My note says, "*Wilkinson* was the deceased; he left a brother a minor and his next of kin.—*Warner* was the deceased's brother by the half blood; and he applied in this case to be joined with the minor, and to take administration with him of the effects of the deceased; administration however was granted to the creditors, because the estate was not sufficient to pay the debts due from it." So the administration *durante minoritate* may be granted to creditors in exclusion of the guardian of the minor, if the estate be insufficient to pay the debts according to this decision in 1731. It has been laid down in other cases that the Court is not bound by the choice of the minor: but that the administration may be given away from the person so chosen.

I recollect a case of *Lewer v. Lewer*, (c) where administration was contested between the father's brother, and the mother's brother, and in which the Court held it was not bound by the choice of the minor.

The choice of the minors would have no great weight here as the eldest of them is not *fourteen*.—If he was near of age, it would be otherwise:—when the case is out of the statute, and the Court is called upon to exercise its discretion, its leaning is to guide itself by the interest in the property, and

(b) Prerog. 1731.

(c) Prerog. 1792.

it is desirous of granting the administration to that person who is most likely to dispose of the property to advantage.

Where the next of kin has no interest in the property, he is by the spirit, though contrary to the letter, of the act excluded;—where there is a residuary legatee, he excludes the next of kin.—If the residuary legatee declines, it is usual to grant it to the next of kin: but there have been cases where the Court, considering the next of kin excluded, has granted it to the creditors. In *Furlonger v. Cox and Others*, (e) the deceased left a widow and a son;—the widow was sole executrix and universal legatee.—She renounced probate, and the son contended for the administration against a creditor.—The Court held that the son was excluded, and the estate being insolvent gave the administration preferably to the creditor.—There is an old case before the Delegates, *Bridges v. The Duke of Newcastle* (f).—Lord Hollis died; Bridges claimed administration as next of kin. The effects were vested by Act of Parliament in the Duke of Newcastle to pay the debts of the deceased. Sir Charles Hedges (g) first, and afterwards the Delegates, held that the next of kin was excluded, and granted the administration to the Duke of Newcastle.

The principle is clear that the next of kin, when he has no interest, may be excluded, and the administration be granted to a person who has an interest in the effects.

That, however, is not the question of the present

(e) Prerog. Jan. 8, 1811.

(f) Deleg. 1712.

(g) Judge of the Prerogative Court.

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case : the party before the Court is not the next of kin, but a relation of the next of kin claiming during the minority.—The guardian has once renounced, a circumstance pretty strong to shew that the creditors are interested. They have entered into the bond, and given the usual securities ; and yet this old woman upwards of *seventy* is brought forward to desire the administration may be granted to her.—I very much agree with what was said by Lord Mansfield in the *Archbishop of Canterbury v. House*, (*h*) “ that no next of kin ever wished for the administration of an insolvent estate for honest purposes.” A long act of Court has been gone into alleging threats, intimidation, and that the estate is solvent ;—affidavits have been made. It is not necessary to wade minutely through all these affidavits : but let us look who are the parties. On one side only this old woman aided by Elizabeth Barton, the daughter of a pretty active person in this business. She (Elizabeth Barton) was only present on the 31st of August : but was not present on the 29th.—Why have not Mr. Wade and Mr. Barton, and Doughton their solicitor, come forward to state the condition of this estate ? These persons I consider to be the real parties to this transaction, not the grandmother. On the other side there are the affidavits of all the creditors stating the amount of the property, and the insolvency of the estate, in which they are joined by Mr. Shuttleworth, the deceased's own solicitor. They give the history of all that passed ; and they are supported by an extract

(*h*) Cowper, 140.

from the registry of the Court at Peterborough, and by an affidavit of the clergyman of the parish.

The deceased kept a small public house which was his own freehold : but it was mortgaged to its utmost amount, or nearly so. A meeting of the creditors took place on the 28th of August.—And I agree that dates are most material in this case—it was settled at this meeting that the administration should be granted to West and Smith and Wade : but Mr. Shuttleworth the solicitor then expressed his doubts whether Wade, not being a creditor, could be joined in it.—In consequence of there being *bona notabilia*, Shuttleworth writes to his proctor here to obtain a proper instrument.—On the 31st of August the proxies of renunciation are signed.—On the 1st of September a commission issues to swear the creditors on the 2nd of September ; they are sworn, and the bond is executed.—What do Wade and Barton in the mean time ? They go to the Court of the diocese of Peterborough, and obtain an administration on the 30th of August on curious averments. If the administration oath was properly administered, they must have taken it under an extraordinary loose, and utter falsely averments.—*Cousins and next of kin* are stated to renounce the administration ; they must therefore have sworn then that the deceased died without children ; and really I feel a good deal of surprize that parties should venture to come before this Court after such conduct—this is within *twelve* days after the deceased's death ; and yet it has been observed in argument, that the other parties were to blame for making preparations, to take out

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the administration in this Court after *fourteen* days—his own administration being thus clandestinely and secretly snapped up. The obtaining the administration thus, throws a colour upon the whole case. I must take the facts as stated by the creditors and their solicitor to be correct against the old woman and Barton's daughter.

Mrs. Willby sets forth at the close of her affidavit, "*That if the administration should be granted to her, the relations and friends of the deceased will come forward, and raise such a sum of money as will be necessary to pay off the whole of the debts owing by the said deceased, even if the estate of the deceased should be insufficient for the purpose.*" The other party has very much to regret, that the relations and friends did not come forward in this mode. They would readily have consented to the grant: but Mrs. Willby herself states to the clergyman of the parish that she cannot undertake the conduct and management of the business; and the clergyman and creditors set on foot a subscription for the maintenance of the children which they abandoned on account of the interference of Mr. Willby, Wade and Barton, in the affairs of the deceased.

How stands the fact of the solvency of the estate? According to the account given by Mrs. Willby with all the assistance of Mr. Douglas, the debt amount to 279*l.* and the personal effects to 205*l.* Upon her own statement the estate is insolvent one fifth;—she throws in the value of the real property:—but this Court has nothing to do with that, the administrator cannot dispose of that.—There may

indeed be special cases in which the creditor under certain circumstances may get at the freehold property : but all this Court enquires into is the solvency of the personal estate.—Besides I have no other *constat* as to the value of the real estate but the statement of this old woman, and her affidavit was not made till the 8th of December, when the other party had no opportunity of replying. There is however a mortgage on it, amounting with the interest to 492*l*.—This probably is the total value—the mortgage *primâ facie* is a charge on the personalty before the realty ; and the heir will have a right, if he can, to have his property exonerated from it ; more especially if, as is generally the case, a bond or other collateral security has been given. Upon her own statement therefore the estate is insolvent.—I cannot hesitate in so holding it.—And I am still more decidedly of this opinion, when I look at the affidavits on the other side on which I place more reliance. Without therefore deciding whether a next of kin may retract an administration before it passes the Seal ;—without deciding whether at any time, *durante minoritate*, a creditor may not contest for that administration ; still I am of opinion, looking at all the circumstances of this case, seeing that there has been a renunciation formally made, that the estate is insolvent, that the minors are very young, and that this woman is quite unfit to carry on the business for their interest and benefit ;—I am of opinion that I ought to grant this administration during their minority to the creditors.—They have an interest in managing the property to the best advantage, and they must ac-

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count hereafter for the monies they receive and expend.—Moreover if they have the administration, the other creditors may come in and prove their debts so as perhaps to secure the payment of them all *pro rata* at some future time. Whereas if the next of kin should possess the grant, he may have no interest in discharging their claims, or he may give a very unfair preference among the creditors.—I shall grant the administration to the creditors.

On costs being pressed.

Per Curiam.

I think, under all the circumstances, I am bound to give costs.

ARCHES COURT OF CANTERBURY.

 REES v. REES.

An Appeal from the Consistory Court of Bristol.

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On the 16th of January, 1816, Ann Catherine Rees took out a citation against John Rees her husband in a cause of divorce by reason of adultery. Allotment of allimony, pending suit.

On the 31st of August 1816, she brought in a libel, consisting of *twelve* articles; and many witnesses were examined in support of it.

On the 3rd of January 1818, an allegation of faculties was given, in which the freehold property of the husband was estimated at 1800*l. per annum.*

The husband in his answer to this allegation deposed that his landed estate did not produce a net income of more than 1015*l. 19s. 10d. per annum;*

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—that by a deed dated the 17th of June 1817, for the payment of debts amounting to 3000*l.*, he secured the annual payment of 350*l.*;—that by another deed of annuity dated the 25th of March 1812, he secured 190*l.* out of his estates to other persons, and consequently that he had remaining only the sum of 475*l.* 12*s.* 10*d.* for the support and maintenance of himself and of several infant children;—and that his wife was entitled to the interest of a certain legacy amounting to 6700*l.* bequeathed to her for her life, by the will of her father, which produces the sum of 335*l.* annually.

Arnold and Daubeny for the appellant.

The allotment of alimony made by the Court below is extravagant, and beyond all precedent. It should be observed that the annuity of 350*l.* has been granted sometime after the citation in this cause was taken out, and we were compelled to take the income as existing without that deduction, the alimony under that calculation amounts to something between a half and a third of the whole property; a proportion which, after examining between thirty and forty decided cases, we venture to state, has never been allotted by any Court.

Stating the case in another point of view, *i. e.* the comparison of the income of the wife with that of the husband, she would be entitled to no alimony according to the rule of these Courts.—Their joint income is 81*l.* The wife in her own right has less than a moiety, and more than a third, a proportion never allotted by any Court; and taking it as it stood when the citation issued, she would have between a third and a fourth of his whole aggre-

gate income.—There is no case in which such an allotment of alimony has ever been made, and besides the husband has seven children to maintain.

Swabey and Jenner contra.

It appears that the deputy registrar was served with this inhibition on the 24th of April 1819; and that the process was not brought in till the first Session of Hilary Term, in that year. No libel for the appellant was admitted till that term.

Per Curiam.

Why then was not an application made to this Court to enforce the inhibition?

Argument resumed.

On the main argument the Court will take into its consideration the nature of the case, and the charges of gross adultery which are alleged against the husband.

JUDGMENT.

SIR JOHN NICHOLL.

This is an appeal from the Consistory Court of Bristol, where it was originally a suit brought by the wife against the husband for a separation by reason of adultery. This appeal is from a grievance; that grievance is the allotment of alimony; it is contended that there should have been no allotment.

It has been truly stated that there is no fixed rule as to alimony;—it is in the discretion of the Court, and that discretion is to be formed from an equitable view of all the circumstances of the case.

Though at the commencement of a suit I cannot take the charge made against the husband as proved, yet it gives a complexion to the case.

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It is perpetually stated against a wife who is proceeded against by her husband for adultery, that though the Court cannot assume her guilty of the offence till it has been proved, still that it is a sort of charge which ought to make her content to live in decent retirement.—On that account a comparatively small allotment is given during the pendency of the suit.—So on the other hand where the wife brings the suit, and is the complainant, where there is no complaint against her, and that not in a suit of cruelty, which frequently turns out a complication of equivocal facts where there are faults on both sides: but here is a continued course of gross and profligate adultery. And I agree with Dr. Jenner, that I must look at the complexion of the case.—The parties were married in 1803—they lived together till 1814—they had a large family, there are seven children living—A young woman is admitted as governess in the family, with whom the husband is charged to have formed an adulterous intercourse; and to have deserted the residence of his wife and family; and to have cohabited with at various lodgings, under various names, in the city of Bristol till this suit commenced.

This is the complexion of the charge;—the suit has been pending for four years—treaties of compromise have been entered into, and no blame can be attached to the wife, the mother of *seven* children, for having listened to proposals of compromise.—But what is the conduct of the husband? No defensive allegation has been given in on his part—the suit has been going on for *four* years. If the charge was completely unfounded, hardly a Court

day would have been suffered to elapse before the **injured** husband would have met it.

It is quite impossible to lay out of my consideration the general tenor of the charge.

It appears from the allotment of the alimony that **there** was some delay on the part of the wife, and **that** she did not apply for it till some time after the **suit** had commenced.

The allegation of faculties states, that the husband **possessed** landed property to the amount of 1800*l.* **per annum**;—his answers deny this, but admit the **net** produce of his estate to be 1015*l.* 19*s.* 10*d.*, and **deny** that he has any other property.—As the Court **has** no certain proportion which it allots, a very **minute** examination of the income is not necessary : —but the Court will presume the husband, who **alone** makes the statement, to have made every possible deduction in his own favour Out of 1015*l.*, **he** claims a deduction for debts—and states that **he** has granted annuities to the amount of 540*l.*: but **the** last and most considerable part of this deduction is for an annuity granted during this suit, **one** year after it had commenced, and **three** years after **the** adultery has been charged. If the husband living **in** public adultery incurs debts and grants annuities **to** pay them, this is not a deduction he is entitled to **make**.—The utmost the Court could allow would be **the** interest of the debt ; and even then the husband **should** satisfy the Court that the debt was **contracted** before the injury was done. Where the party **himself** has the benefit of being heard on his own **statements**, he should set forth every thing fully, or **the** Court will take the statement to his disadvantage.

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It has been pressed that he has the maintenance of seven children.—I wish that fact had been more fully stated in his answers ;—it is highly improbable that he has during this suit, or that he is likely hereafter to have, the sole maintenance of them. I am aware that the obligation of maintaining them lies on the husband, and I shall not take this part of the subject into much consideration.

The wife has a separate income of 350*l.* *per annum* for his life ; if she had not had this property I think the Court below would have been called upon to grant her more than 100*l.*

I know no such rule as that stated that the Court usually grants one-sixth ;—the general proportion of alimony is much higher than has been stated.

The Court of Appeal is always unwilling, except a decree is manifestly wrong in point of principle or extent, to disturb a sentence : but, considering that the wife was two years before she applied for alimony, I shall be disposed not to carry grant back to the return of the citation, but to make it merely prospective. The wife must put to additional expenses in the conduct of suit beyond those which will be allowed taxation.

I think the wife is entitled to 100*l.* *per annum* additional to her separate income ; and, under the circumstances, it is fair and equitable to direct that part of the sentence which directs 100*l.* alimony to be paid from the return citation : but I shall direct it to be paid from the date of the decree.

There has been great delay. I wish that in the future proceedings all possible expedition should be used ; and it should be understood generally by the Registrars in the Courts below, that if they do not enforce the process of this Court, this Court will take means to compel them to do so.

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HIGH COURT OF DELEGATES.

TEMPLE v. WALKER.

1820. *An Appeal from the Prerogative Court of York.*
Michaelmas
Term.
 Nov. 30.

An allegation,
 pleading the
 will of a mar-
 ried woman,
 ordered to be
 reformed.

THE Delegates who sate under this commission were,—

Mr. Baron Graham,
 Mr. Justice Bayley,
 Mr. Justice Park,
 Dr. Arnold,
 Dr. Jenner,
 Dr. Daubeney,
 Dr. Phillimore, and
 Dr. Gostling.

The cause commenced in the Prerogative Court of York, by a citation taken out on the part of John Walker the younger, the sole executor named in the will of Sarah Walker, citing Richard Temple, doctor of physic, as the lawful husband of the deceased, to appear and shew cause

why probate should not be granted to him of the said will. An appearance was given for the party cited, who alleged himself to be the husband of Sarah Temple, and as such entitled to the administration of her personal estate and effects; and prayed administration accordingly. An allegation was given on the part of the executor,—which pleaded,

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1st, That the said Sarah Temple, the party in this cause deceased, was the natural and lawful and only child of Thomas Stockdale, wine-merchant, and Sarah his wife, and afterwards his widow, late of Scarborough aforesaid, both now deceased; and in or about the month of December, in the year of our Lord 1787, was lawfully married in the parish church of Scarborough aforesaid, to the said Richard Temple, the other party in this cause, and that this was and is true, public, and notorious, and so much the said Richard Temple doth know or hath heard, and in his conscience believes and hath confessed to be true; and the party proponent doth allege and propound of any other time and times, and every thing in this and the subsequent articles of this allegation contained, jointly and severally.

2d, That the said Sarah Temple and Richard Temple, from and immediately after their said marriage, mentioned in the next preceding article, lived and cohabited together as lawful husband and wife, at Scarborough aforesaid, until in or about the month of October, in the year of our Lord 1789, *when the said Richard Temple did of his own accord forsake the said Sarah Temple his*

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*wife, and depart from his residence at Scarborough aforesaid ; that in consequence thereof, and of many unhappy disputes and differences then existing between them the said Richard Temple and Sarah Temple, they mutually agreed to live separate and apart for the remainder of their joint lives. And the party proponent doth further allege and propound, that in and by a certain indenture or deed of separation, bearing date the sixth day of July, in the year of our Lord 1790, and made, or mentioned to be made between the said Richard Temple, then or late of Scarborough aforesaid, and the said Sarah Temple his wife, late Sarah Stockdale, spinster, the only child and heiress at law, and also next of kin of Thomas Stockdale, late of Scarborough aforesaid, wine-merchant, deceased, of the one part, and Sarah Stockdale of Scarborough aforesaid, widow and relict, and also administratrix of the goods, chattels and credits of the said Thomas Stockdale deceased, and mother of the said Sarah Temple and John Walker, of Malton in the said county of York, merchant, of the other part, the said Richard Temple did absolutely grant, bargain, sell, assign, transfer, and set over unto the said Sarah Stockdale and John Walker, their executors, administrators, and assigns, for the considerations therein mentioned, certain household furniture, monies, funds and securities, goods and other personal estate, effects and premises therein mentioned, in trust, for the sole and separate use, benefit, advantage and disposal of the said Sarah Temple during her life, whether married or sole, and as if she was unmar-*



ried; and from and after the decease of the said Sarah Temple as to what should remain of the said furniture, monies, funds, and securities, goods and other personal estate, effects and premises, unapplied or undisposed of as aforesaid, upon trust that they the said Sarah Stockdale and John Walker, and the survivor of them, her or his executors, administrators or assigns, should assign, transfer, pay, release, or otherwise dispose of the same respectively, to such person or persons, for such intents and purposes, and in such manner as she the said Sarah Temple, whether married or sole, as if she were unmarried, by any deed or writing under her hand and seal, or otherwise, should, notwithstanding her coverture, order, direct, or appoint, and in default of and until such order, direction or appointment should be made: and as to such part or parts of the said trust premises as should from time to time remain undisposed of, under the trusts aforesaid, upon trust that they the said trustees should assign, transfer, pay, apply and dispose of the same to such person or persons, and in such manner and form, as she the said Sarah Temple, by her last will and testament, or any writing in the nature thereof, or any codicil thereto, should, notwithstanding her coverture, give, devise, bequeath, order, direct, limit, or appoint; and this was and is true, public, and notorious, and so much the said Richard Temple doth know or hath heard, and in his conscience believes, and hath confessed to be true; and the party proponent doth allege and propound as before.

3d, That the said Sarah Temple, the testatrix

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in this cause, deceased, being of sound and disposing mind, memory, and understanding, and not having previously by her deed or writing disposed of the monies, funds, and securities, and premises by the said indenture submitted to her disposal and appointment, but having an intent and purpose to make her last will and testament in writing, or a writing purporting to be and in the nature of her last will and testament, and thereby to dispose of all the property, estate and effects, of which she had a disposing power, under and by virtue of the said indenture, by virtue and in execution of the powers and authorities mentioned and recited in the said indenture, and of every other right, power, or authority enabling her thereunto, did give directions and instructions for making and drawing thereof; and pursuant to such directions and instructions the very will or testamentary writing now pleaded and exhibited was drawn up and reduced into writing, in the very manner and form as the same now appears: and after the same was drawn up and reduced into writing, the same was audibly and distinctly read over to or by the said testatrix, who well knew and understood the contents thereof, and liked and approved of the same; and in testimony of such her good liking and approbation thereof, she the said testatrix did, on or about the 21st day of April, in the year of our Lord 1817, being the day of the date thereof, set and subscribe her name at the foot or bottom of the thirteen first sheets of the said will or testamentary writing, and at the foot or bottom of the fourteenth or last sheet thereof did set and sub-

scribe her name and affix her seal in the manner and form as the same now appears thereon ; and did publish and declare the same as and for her last will and testament, in the presence of several credible witnesses, who, at her request, in her presence, and also in the presence of each other, did then also set and subscribe their names as witnesses thereto; in the manner and form as now appears thereon ; and she the said testatrix of such her last will and testament, or testamentary writing, did nominate, constitute, and appoint the said John Walker the younger sole executor, and did give, will, and bequeath, dispose, and do in all things as in the said last will and testament or testamentary writing is contained ; and she the said testatrix was, at and during all and singular the premises, of sound and perfect mind, memory, and understanding, and talked and discoursed rationally and sensibly, and well knew and understood what she then said and did, and was capable of making a will, or of doing any other serious or rational act of that or the like nature ; and this was and is true, public, and notorious, and so much the said Richard Temple doth know or hath heard, and in his conscience believes, and hath confessed to be true ; and the party proponent doth allege and propound as before.

This allegation had been admitted in the Court below ; and from that sentence the present appeal was interposed.

*Dr. Adams in opposition to the sentence of the Court at York.*

Unless the general law is controuled, the hus-

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band has a right to the administration. There are two modes by which a married woman may acquire a right to dispose of property ; one, by settlement made anterior to marriage ; the other, by an agreement subsequent to marriage, through the medium of trustees : the latter is the more questionable mode. It should seem from the will which is propounded, that certain property is mentioned as at the disposal of the wife without the value of it being set out : it is limited not only to certain personal property, but to consist only of what shall remain of this property.

Per Curiam, Mr. Justice Bayley.

I take it for granted, that when a will is made by a femme coverte under a power, the usual course is to give a probate limited according to the power.

Per Curiam, Dr. Arnold.

The Court understood you to object, that the deeds recited are not pleaded in the allegation and exhibited.

Dr. Adams.

Certainly that is one objection :—this seems a novel experiment, to prove by parole the contents of a written instrument.

This allegation is not capable of being reforme—to allow them to reform it now would be to make a case for them

The Court stopped the argument, and directed the counsel on the other side to state why deeds alluded to in the allegation were not exhibited.

Washington and Mr. Parke were on the

Sir Christopher Robinson (K. A.) in support of the sentence.

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The real question is whether the power shall be exhibited in this Court, or in another stage of this cause. In our practice it is not necessary to introduce such a deed in an allegation; it may be taken to exist by admission of the opposite parties. In *Richard v. Meade*, Prerog. 1805, where Mrs. Shave the testatrix had a separate property, the deed by which she had a power of disposing of it was not pleaded in the allegation; —the settlement there was brought in, in a later stage of the proceedings, upon an assignation on the adverse proctor.

*Per Curiam, Mr. Justice Bayley.*

Is it not much more obvious that the party who claims under a particular document should himself exhibit that document?

*Sir Christopher Robinson.*

The executor may not have the instrument; it may not be in his power to exhibit it; he may be himself a party to it.

*Per Curiam, Mr. Baron Graham.*

*Primâ facie* a married woman has no title to make a will. If she claims a right, she must at least shew her title, because such a right is contrary to the general tenor of the law.

*Sir Christopher Robinson.*

He may not be able.

*Per Curiam, Mr. Justice Bayley.*

Then you must plead that it is not in your power; such at least would be our course.

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*Sir Christopher Robinson.*

The course of our Courts was different in Mrs. Shave's case ; and if a case justifies the distinction, it surely is the present.

Some authorities of the Courts of common law are in favour of a contrary course ;—it is laid down that a defendant shall not have over of a record when he is a party to it.

*Per Curiam, Mr. Justice Bayley.*

We never have over of a record now.

*Sir Christopher Robinson.*

Still on the broad challenge between other cases and the present ; suppose it essential that the instrument should appear good to the Judge, or essential as to the other parties.—If this was not an original cause, I should not think it of much importance to resist it : but here on an appeal the Court would not press lightly on forms of jurisdiction.

On the authority of Mrs. Shave's case, we contend that we are not bound to plead the deed.

*Swabey, on the same side.*

Contracts of this nature have frequently received the sanction of the Ecclesiastical Courts when entered into after marriage.

*Per Curiam, Mr. Justice Bayley.*

But the question is whether that point is ripe for discussion ;—we are not likely to give an extrajudicial opinion upon it.

*Dr. Swabey.*

Clouds v. Robinson, Prerog. and Copeland v. Pedder, Prerog., were both cases in which the power was granted subsequent to marriage ; and

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or  
bm

both the wills were established by Sir George Hay.

*Mr. Tindal on the same side.*

JUDGMENT.

*Per Curiam, Dr. Arnold.*

The Court is of opinion that the allegation must be reformed for the purpose of allowing the party to plead the power under which the will was made. With the concurrence of the rest of the Court, I state also that we think it proper to omit the following words in the third article of the allegation, *vis. When the said Richard Temple did of his own accord forsake the said Sarah Temple his wife, and depart from his residence at Scarborough aforesaid.* We think these words may tend to the introduction of extraneous matter, and lead to evidence which cannot affect the question before the Court in this allegation.

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The Court reversed the sentence of the Prærogative Court of York, retained the principal cause, and directed the allegation to be reformed.

The allegation was brought in reformed accordingly to the directions of the Court.

1821.  
Feb. 20.

Before the Condelegates, Dr. Arnold, Dr. Jenner, Dr. Daubeny, Dr. Phillimore, and Dr. Gostling.

July 12.

Moore, proctor for Richard Temple the defendant, declared that he did not further oppose the will of Sarah Temple, the party in this cause deceased; and prayed the Judge to decree the ex-

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penses of his party, the appellant, to be paid out of the estate of the said deceased, and to dismiss his party from this appeal. Present *Toller*, (proctor to the respondent) objecting thereto. The Court, the delegates having heard counsel on both sides, refused the prayer made by *Moore*, and assigned him to give in his client's answers on the by-day.

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Nov. 7. Richard Temple gave in his personal answers.

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1822.  
Feb. 13.

The Delegates pronounced for the force and validity of the last will and testament of *Sarah Temple*, bearing date the 21st of April, 1817, pronounced in this cause; and decreed that letters of administration, with the will annexed, of all and singular the goods, chattels, and credits of the said *Sarah Temple* to *John Walker the younger*, present *Moore*, on behalf of *Richard Temple the husband* consenting thereto.

The Judges moreover decreed the expenses of the said *Richard Temple* to be paid out of the estate of the party deceased.

(a) The property disposed of by the will amounted to nearly 50,000*l.* Out of this an annuity of 50*l. per annum* was bequeathed to the husband.

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## PREROGATIVE COURT OF CANTERBURY.

FINUCANE v. GAYFERE.

1820.  
*Michaelmas*  
*Term.*  
 December 1.

**ELIZABETH GORDON**, of Percy-street, London, died a widow in July 1807. On the 30th of October of the same year probate of a will, and two codicils, disposing of property to the amount of 90,000*l.*, was granted to Thomas Gayfere and the Rev. Harry Welstead, the executors. On the 20th of October 1820, the probate of the second of the two codicils was called in by Maria Finucane, widow, one of the substituted residuary legatees named in the will; and Thomas Gayfere, the only surviving executor, was cited to shew cause why the probate should not be revoked, and the codicil be pronounced null and void.

Probate of an  
 imperfect co-  
 dicil which  
 had been  
 granted in  
 1807, re-  
 voked.

On the 15th of November following, the executor brought in an allegation propounding the second codicil, and pleading that "the deceased, having an intention to alter the disposition of property, as contained in her last will and testament, and the first codicil thereto, and more particularly with respect to the bequest of the residue of her estate and effects by her said will; did some time subsequent to the 28th of June 1806, being the date of her first codicil, with

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her own hand prepare and write the aforesaid second codicil, with its several obliterations and interlineations;—that the whole body and contents of the instrument were of her own proper handwriting;—and that on the 28th of July, 1807, being four days after the death of the deceased, this second codicil, and also the aforesaid will and testament and the first codicil, were found locked up in a mahogany box, in which the deceased was accustomed to keep her papers of moment and concern.”

The codicil (*a*) propounded was as follows:—

“ I wish to revoke the fifty pounds to Michel Anglo Taylor, having by the codicil given him a ring bequeath in this will, to the late George Richard, esquire decease. And I also revoke the give of the residue of my propreity real and personal to James Gordon, son of the late James and Mary Gordon of Rochester; and in the stead thereof, I give to the said James Gordon the sum of one hundred pounds as a legacy at my decease, and the sum of one hundred pounds a year during his natural life; and then the residue of my estates real and personal, to be equally divided between the children of the said James Gordon, Henry, George, and Maria Finucane, brothers and sister to the aforesaid James Gordon, son of the late James and Mary Gordon of Rochester, and to the children of Mary Payler, daughter of the late George and Ann Gordon of Rochester, decease, the children of John Wathen, grandson to the

(*a*) There were many erasures and interlineations in the paper.

**afore**said John Wathen, late of Catherine Court, **decease**, and the children of Eliza Wathen, grand-daughter of the said John Wathen **decease**. To the children of Phebe Smith, daughter of Francis and Mary Smith of New Building Yorkshire. To the children of Kathre Harman, and Mary Southam, grand-daughter to Eliza Bellew **decease**, in equal division, to and amongst such child or children **equally** divided. Power to the trustees to advance **what** they may think proper to any of them for education, or to apprentice to such situation as might be proper to place them in a way to provide for themselves, and as they may die, their share become as part of the residue, and to be equally **dested** to any among the survivors equally as their share, if they do not live to the age of twenty-one-years; and I also give and bequeath to my servant Eliza Norton five pounds a year during her natural life. I also give to the parish of Shorne and to *Allowes Barley*, Tower Street, each one hundred pounds, the interest of it to be laid out in coals or bread, in such manner as the churchwardens for the time being shall think most for the poor persons of the said parish; and fifty pounds I give and bequeath to the City of London Lying-Inn-Hospital.

And Thomas Gordon Ansell. I also wish to give to Hannah Beesley, above what she is entitled to by the codicil of my will, twenty pounds for mourning.

*Lushington and Dodson in opposition to the allegation.*

The length of time which the party has been suffered to remain in possession of the probate is to

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be explained by the proceedings which have taken place in Chancery, where this property has long been litigated. The parties interested had no idea till a late period, that there was the informality which exists in the codicil. The case of *Satterthwaite v. Satterthwaite (a)* is precisely analogous to this.

*Swabey and Jenner in support of the codicil.*

The time which has elapsed, since the grant of this probate in 1807, will at least induce the Court to accept a less degree of proof than it would do in an ordinary case;—it is a strong circumstance that it was found in the same box with the will and the other codicil;—the probate has been acted upon, and many of the legacies have been paid.

JUDGMENT.

SIR JOHN NICHOLL.

Probate of the will and two codicils was granted by this Court in 1807; probate of the second codicil is now called in by a person who is a substituted residuary legatee; her right devolved upon her, it is stated, in the year 1816; since that time the property has been in the Court of Chancery.

Certainly the application comes at a late period to revoke such an instrument: but time alone is no absolute bar to it.—It has been said, that being brought forward at so late a period, the Court will be contented with slighter proof. This observation is well founded to a certain extent: but still there must be that degree of proof which would bring the case

(a) Vide *supra*, p. 1.

**w**ithin the rules of the Court; at the same time **t**he executor is not to be protected, if he has **p**roceeded in the first instance, in a manner in which **h**e was not warranted.

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v.

GAYFERE.

**I** must decide this case upon ordinary principles; **a**nd, if so, I can entertain no doubt respecting it. **I**t is **p**leaded that the deceased died in July 1807; that, **i**ntending to alter her will and codicil subsequent to **J**une 1806, she wrote the codicil in question; **a**nd that at her death the three instruments were **f**ound together in her mahogany writing desk.—**T**hese are all the circumstances pleaded. **T**here is **n**othing that fixes it at so short a time before her **d**eath, that she can be supposed to have been **s**truck with death in the very act of writing this **p**aper. **T**he date cannot be fixed at a later period **t**han the last year of her life:—there is nothing to **s**hew that she was prevented from finishing it by **t**he intervention of death, and not completing the **i**nstrument, the presumption of law is, that she **a**bandoned the intention.

**I**f there was nothing to prevent her from finishing this paper, the question then comes to this, **w**hether it can be considered as a finished paper; **w**hether she intended it to operate in this form, **a**nd to do nothing more to it.

**I** am therefore to consider, whether it is possible that the deceased could have considered this as a finished paper? She had executed a formal **w**ill in 1801, drawn up by her solicitor—the bulk of her property was real property.—Upon the last **s**heet of that will, she had subsequently a codicil **r**egularly and formally drawn up. **T**his also was

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signed by herself, sealed, and attested by three witnesses; and is dated in June 1816.

The present paper is all in her own handwriting: it begins, "I wish." It has a variety of interlineations and erasures, no date, no signature, no concluding words; it ends with a legacy of 20*l.* to a servant for mourning;—there is nothing like a conclusion. It seems particularly intended for the disposition of the residue:—she also makes a new disposition of her real as well as personal property; I cannot doubt that she intended to have a regular instrument drawn and executed in the same manner that she had executed her will and the other codicil, and did not consider this paper as finished or operative.

I must therefore reject this allegation.

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*Michaelmas*  
*Term.*  
December 2.

REDMILL and REDMILL v. REDMILL.

When there is no party before the Court who has an interest in supporting a testamentary paper propounded, the Court will require the appearance of such a party.

**ROBERT** Redmill, C. B. a captain in the Royal Navy, died on the 19th of February 1819. A will and codicil bearing date respectively on the 12th and 15th of February 1819, were propounded in an allegation by the residuary legatees named in the will, as to one moiety of the deceased's estate and effects; and were opposed by Susanna Redmill the widow of the deceased, who cross-examined

the witnesses examined on the part of the residuary legatees, and gave a responsive allegation, but produced no witnesses in proof of it, and took no copies of the evidence. In the course of the proceedings the residuary legatees as to the other moiety of the estate, intervened and opposed the codicil, and cross-examined one of the witnesses produced on the allegation given in by the other residuary legatees.

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v.  
REDMILL

The cause stood for hearing.

*Per Curiam.*

A difficulty strikes me as to the want of proper parties before the Court—there is no person before the Court who has an interest in supporting the paper—two parties are here both interested to get rid of it; there are, I think, considerable doubts as to the validity of the codicil, but all the parties interested should be called before the Court either by notice or by formal process;—it does not appear from the proceedings that any party has had notice; how am I to pronounce against the codicil, when I find there is no person before me interested to support it.

The will is most clearly proved, and it excludes the widow;—the more clearly the will is proved, the more doubt is thrown on the codicil.—The wife abandons her opposition;—the residuary legatees are in fact the next of kin.—The cause cannot proceed till some party interested to maintain it is before the Court—it would be a strong thing for a party having propounded a codicil to take probate of a will without it.

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Let the question stand over for the consideration  
of the parties and their counsel.

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Dec. 2.

BATES and Others v. GITTENS.

A party is not  
precluded  
from proving  
himself to be  
the husband  
of the same  
person whose  
will he had  
propounded  
in a former  
suit as ex-  
ecutor and re-  
siduary le-  
gatee.

JOHN Cox Gittens applied for probate of the will of Elizabeth Cox Gittens, *widow*, as the executor and residuary legatee. The usual proceedings were had. Proxies and affidavits of scripts were brought in from each party; and Austen (Proctor) on behalf of John Cox Gittens declared he propounded the will, and asserted an allegation. On the 15th of November, this allegation not having been brought in, Townsend (Proctor) prayed the Judge to decree letters of administration to the next of kin, unless the allegation was brought in on the next Court. On the 23d of November, Austen alleged that John Cox Gittens was as well the lawful husband of the deceased as the executor named in her will; and therefore denied that the other parties had any interest in the goods of the deceased, or were competent in law to call upon the executor to propound the will, and declared he was ready to propound the interest of the husband if it should be denied—but the allegation not having been brought in as assigned, the Court decreed the administration to the other parties.

Before the administration passed the seal, a caveat was entered against it—this caveat was warned



and objection was taken on the ground that the parties had already been before the Court, and that the Court had decided between them. To this it was replied that this was an entire new suit, and that it was competent for John Cox Gittens to prove himself the husband of the deceased, which must of necessity exclude all other interests.

*Per Curiam.*

I must consider this to be a new suit, and that I cannot preclude the party from proving himself to be the husband to the deceased.

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EVANS v. KNIGHT and MOORE.

**J**OHAN MOORE, of Tottenham Court Road, in the county of Middlesex, gave instructions for his will on the 21st of April, 1812: but died on the 24th of that month, before the will was prepared for execution. On the 23d of May, 1812, probate of these instructions, as containing the last will and testament of the deceased, was granted to Mary Moore, his widow, Richard Moore, his brother, and Joseph Knight, the executors. The will remained undisputed till the 7th of April, 1820, when a decree was taken out at the instance of Ursula Sheriff, widow, and Mary Evans, widow, the sisters and two of the next of kin of the deceased, against the executors, to shew cause why probate of the will should not be revoked as having been obtained under false suggestions, and the said will declared null and invalid.

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The executors propounded the will in an allegation consisting of sixteen articles. The first article pleaded that in April, 1803, a marriage in fact, but not according to the rites and ceremonies of the Church of England, was had between John Moore, the deceased, and Mary Hewitt, spinster, that they lived and cohabited together as husband and wife. That during such cohabitation two children were born:—Jane Moore on July 21, 1804; and Richard Moore on the 7th of April, 1810. That the deceased constantly owned and acknowledged them to be his children; and maintained, clothed, and educated them as such.

The remaining articles pleaded declarations and acts of the deceased from which his testamentary intentions were deducible;—the circumstances under which the instructions for the will were given;—and the manner in which the deceased was prevented by the intervention of sudden death from signing the formal will which had been prepared in conformity with those instructions.

A responsive
 allegation,
 materially re-
 formed.

A responsive allegation was brought in on the part of the next of kin: it consisted of *eight* articles, and pleaded,—

First, The death of John Moore in April 1812; and enumerated the relations who would be entitled to share in his property if he should be pronounced to have died intestate.

Secondly, That no marriage was in fact contracted between John Moore and Mary Brown; and that in the beginning of 1819, a correspondence took place between William James the son of Mary Evans, one of the parties in the cause,

and James Brown the husband of Mary Brown, in the course of which correspondence James Brown at first declared, that he had seen an entry of such marriage, and also the clergyman who had solemnized the same, and offered to produce a certificate thereof:—but that he afterwards acknowledged his inability to do so, and admitted that no such marriage had taken place.

Thirdly, In supply of proof of the facts stated in the preceding article, two letters from James Brown to William James.

Fourthly, That, the deceased prior to his cohabitation with Mary Brown, had cohabited with two other females in succession; that by the first of them he had a natural daughter who was called Betty Moore, and was since married to a person of the name of White; and by the second a son called John Moore, and a natural daughter called Mary Moore; that from the period of the respective births of these children he acknowledged, maintained, clothed, and educated them; that John Moore being a midshipman in the Royal Navy, resided when from sea at a short distance from his father's house, and was in the habit of taking his meals and passing his time with him; that, notwithstanding his daily visits at the house of the deceased, he was nevertheless forbidden, and prevented by the said Mary Brown (*a*) (late one of the parties in this cause) from having access to the said deceased during his confinement with the illness of

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(*a*) Subsequently to the death of John Moore, she had intermarried with a person of the name of Brown.

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which he died. That on the night previous to the death of the said deceased, he the said John Moore having expressed an anxious desire to be permitted to sit up with his said father, was peremptorily refused permission to do so, by the said Mary Brown, who compelled him to quit the said house — That during such the illness of the deceased Mary Brown treated him with great indifference and neglect, which increased after the period when the pretended instructions propounded in this cause had been, as pretended, obtained from him; that the said deceased in consequence thereof, at the commencement of his said illness, sent for his daughter the said Betty White to nurse and attend upon him, and would not permit any other person so to do, frequently declaring when other persons approached him for that purpose, that his girl (thereby meaning and intending the said Betty White) should attend upon him.

Fifthly, That the said deceased about two or three years prior to his death took upon him the entire maintenance, education, and bringing up, of — White, a child of the said Betty White, who was then of the age of six or seven years or thereabouts and frequently declared that it was his intention to take the said child entirely from off the hands of the said Betty White and her husband, and to provide wholly for him. That the said deceased accordingly from that time maintained the said child at his own charge; and that the said child was at school at the expense of the said deceased at the time of his the said deceased's death.

Sixthly, That for some days preceding his death

he was almost constantly in a state of delirium, and totally incapable of knowing what he said or did ; and when the delirium subsided, he was subject to delusion and mental derangement.

Seventhly, At the time the instructions were alleged to have been taken that he was utterly incapable.

Eighthly, That Joseph Knight, who is described in the instructions as residing in Southampton Row, Bloomsbury, at that time, and for several years prior to the same, resided in High Holborn, near Grays Inn, which circumstance was well known to the said deceased so long as he retained the enjoyment of his mental faculties ; that Richard Moore, the brother of the said deceased, another of the executors named in the said pretended instructions, having attended the funeral of the said deceased, together with the said Joseph Knight and others, and having then for the first time heard the said will read, called the said Joseph Knight into a private room, and expressed his disapprobation of some parts of the said will, and his inclination to oppose the validity of the same upon the ground of the mental incapacity of the said deceased at the time the same was drawn up. That the said Joseph Knight thereupon admitted his belief that the same was in fact on that account invalid (if opposed) and added that the fact of his the said Joseph Knight's residence being so improperly described in the same, was a very strong proof in this the said Joseph Knight's mind of such the mental incapacity of the said deceased at the time when the said instructions were prepared : but that the

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said Joseph Knight, then prevailed upon the said Richard Moore, to permit the said will or instructions to remain unopposed, as, in the event of the same being pronounced invalid, the property of the said deceased would still descend to the said Mary Brown and her children, who were at that time believed to be the lawful relict and children of the said deceased.

Jenner and Phillimore objected to the 2nd, 3rd, 4th, 5th, and 8th articles of the allegation.

Lushington and Dodson *contra*.

Cited Phillips, p. 91. and *The King v. The Inhabitants of Hardwicke*, (a) to shew that the letters annexed to the third article were admissible evidence.

JUDGMENT.

SIR JOHN NICHOLL.

In considering the admissibility of allegations, the Court exercises a certain degree of discretion upon a view of the whole case: it looks whether the facts pleaded bear remotely, whether they bear directly upon the question, or whether, if proved, they can make no impression. In doing this the Court exercises a discretion advantageous and convenient for the parties themselves. Parties are frequently anxious to introduce matters they think of consequence, but which eventually are injurious to themselves, and lead only to unnecessary expence.

In this case I cannot lay out of my consideration, that the suit is commenced eight years after the probate has been granted: the party, after sub-

(a) 11 East, p. 578.

mitting so long to this will, has now put the executors upon the proof of it in solemn form of law ; and not only this, but offers to plead facts negatively to set it aside. The persons provided for by the will are the reputed wife and two children of the deceased ; and it is after the drawer of the will is dead, that they are now called upon to prove it.

Under such circumstances, it is the duty of the Court not to admit any matter which is not of the most stringent kind ; the real point at issue is to be kept in mind, namely, the validity of the will. The whole texture of this allegation is of a slight kind, and looks rather like hopeless opposition ; if so, the Court will do well for the party to reduce it, as in all probability it will involve the next of kin in costs.—Still however the Court must admit those facts to go to proof which directly impeach the validity of the will.

The second and third articles are offered in opposition to the first article of the opposite allegation. The Court here is enquiring not into the validity of a marriage, but into the validity of a will. Whether the fact of marriage be true or not, it is equally probable that the deceased should have made this will ;—nay, it is even more probable that he should have made it, if he knew he was not validly married. It was an additional circumstance that rendered the making this will an act which duty and natural affection pointed out. That these two articles assert is, that there is no fact of marriage ; they cannot prove this negatively.—It is said that the letters pleaded are

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written by a person whose declarations are admissible evidence. I will not go into that question, because the contents of the letters cannot carry the case further than it now stands. One letter says there was the certificate of a marriage, the other that there was not; the fact itself is immaterial. The Court must confine itself as much as possible to facts that are necessary,—leaving to the party any benefit which may arise from the adverse party failing to prove the fact of marriage. I shall reject these two articles.

The fourth article recites a further part of the first article, which pleads the affection of the deceased for the children, in whose behalf the will is written. It does not contradict the fact of that affection: but it pleads that he had before cohabited with two other women, and left children by them, a daughter grown up, and a son a midshipman. How does this bear even on the probability? Is it improbable that, because he had children by other women, which children appear to have been provided for, that he should not have made a will providing for these children, and a woman whom he lived with, not merely as a mistress, but subsequently recognized as his wife?—These facts, if proved, would not in my judgment bear materially upon the case. Another circumstance is stated, that Mrs. Moore excluded the young midshipman from his father's house when he was dying: but really I think the party would get no benefit at this remote period, in being allowed to go into the investigation of a collateral transaction, which can bear very little on the question. It also pleaded that

during his illness Mary Brown treated him with neglect:—how does this bear upon the case? and how is it to be enquired into? If she neglected him after the instructions were drawn up, it rather looks as if he was considered a capable testator upon giving the instructions:—but this is so remote a circumstance that it cannot be admitted.

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The fifth article states that the deceased took upon himself the maintenance of a child of his natural daughter Betty White, and frequently declared it was his intention to provide for her. This circumstance, in a case of recent occurrence connected with others, might have some little weight:—but what is the conclusion from this? That he might have had thoughts perhaps of this: but that he altered his mind.—This is a grandchild, and he had children of his own to provide for. Again the inference from this fact, in any way, is very remote;—it is hardly worth putting the parties to the expense of proving it.

The sixth and seventh articles go directly to the validity of the will; they plead frequent delirium, and in the absence of delirium, incapacity:—if the party has an opportunity of proving this, it may materially affect, and ultimately decide, against the validity of this paper.

The eighth article pleads that Joseph Knight, who is described in the instructions as residing in Southampton Row, Bloomsbury, never resided there, but in High Holborn, near Gray's Inn. This, it is argued, would furnish evidence of incapacity.—I think it is not more than a fact of an equivocal nature, such as may have escaped the

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recollection of a person of the best capacity, or may have been the misapprehension of the writer in taking the instructions.—If the deceased is proved to have been delirious, the party will have the benefit of it;—if he was not delirious, this circumstance cannot bear at all on the case:—this part however of the article, if it is pressed, may stand; but the remainder cannot. As his executors have acted as if they thought him capable by taking probate, I shall not now allow them, by introducing their private conversations, to swell out the proofs and expenses of this cause. I should not do the party any benefit by admitting it to proof; for, independently of such a conversation at such a time being very incredible, it is difficult to suppose, that the deceased meant to leave his wife and children without provision.

I will allow the former part of the eighth article and the fifth to stand if pressed to do so by the Counsel: but, having reformed the allegation by rejecting the other articles objected to, I shall admit it.

In the same case.

Lushington applied to the Court to allow further interrogatories to be administered to Hannah Roberts and John Kersey, two witnesses who had already been examined in the cause. He founded this application on an affidavit of the solicitor in the cause, who stated, that certain facts had come to his knowledge, which were very material to the interests of his client since the examination of the witnesses had been complete.

and they had been dismissed by the executrix; and he cited (*a*) *Cowslade v. Cornish*, as an authority, to induce the Court to accede to this motion.

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Jenner and Phillimore contra.

The application is novel—may lead to the introduction of a most dangerous precedent; the practice of the Court of Chancery not at all analogous to ours, and the case of *Cowslade v. Cornish*, shew that even in that Court, under the circumstances of this case, such an application would not be acceded to.

Per Curiam.

This application is perfectly novel; for the thirty-five years that I have known this Court, I do not recollect such a one:—it would be exceedingly dangerous; a witness may be tampered with, and then re-examined; at the same time I am not quite prepared to state, that I would allow this to be done under no circumstances, though I should be loth to establish such a precedent.

Here the application is founded on the affidavit of the solicitor:—the solicitor is not known to the Court; the proctor who is *dominus litis*, and the party, are alone known to the Court;—and there is another reason why the proctor ought to have made the affidavit in preference to the solicitor, *viz.* that the proctor has a knowledge of the practice of the Court, and knows what circumstances ought to have weight, whereas the solicitor is a mere stranger of whom the Court knows nothing.

(*a*) 2 Vezey, 272.

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The practice of the Court of Chancery is not analogous to our proceedings.

I cannot allow this to be done: if the fact is material in the cause, it should have been pleaded in an allegation—if it affects the character of a witness, it should have been stated in an exceptive plea; if it could be alleged to be matter *noviter ad notitiam perventa*, it might be admitted even after publication, the Court would have had an opportunity of judging itself how far the facts are or are not material.

Motion refused.

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The same will may contain the appointment of one executor for general, and of another for limited, purposes.

LYNCH v. BELLEW and FALLON.

HENRY LYNCH, a merchant, died in May, 1820, in the city of Cadiz where he resided, leaving considerable property both in Spain and England: his personalty in this country was stated at 30,000*l.* in the funds, and 8000*l.* due to him from certain merchants and bankers in London.

His will was formally executed on the 11th of December 1819, in the presence of a Spanish notary at Cadiz;—and a question arose upon it, as to the appointment of the executors. The will was divided into several clauses: those which bore upon the question at issue were the following,—

“ I order that when my death shall take place, my body shall be ecclesiastically buried with the shroud funeral apparatus, and masses that shall be deemed fit by my testamentary executors.

"I do moreover order that the said funds in England, or the lands that may be therewith purchased, should, that take place, may be and may be understood to be entailed, as I constitute them such; and I appoint for the possession and enjoyment thereof, in the first place the said Don Henricque Edwardo Lynch, the firstborn son of my brother Don Patricio Lynch, and of Dona Maria Blake of *Clogher House in the province of Connaught and county of Mayo in Ireland*, who is to have and enjoy the entail during his life only. At his death it shall devolve to his eldest son, following the line of firstborn amongst the male children, and not female children had in lawful marriage. Should he not have any male children on the death of my said nephew, his own brother next of age shall enter into possession and enjoy his entail, and the lawful succession of the latter in like manner, so that the possessor is always to be a male. In default of sons or legal male descendants of my brother Don Patricio, the children of my sister Dona Juana Lynch De Blake, had by her marriage with Don Isidoro Blake, and their lawful descendants, shall in like manner enjoy and possess the entail, preferring the elder to the younger with the exclusion of the females, and under the condition, that the possessor shall at all times bear the surname of Lynch only. And, in default of all the abovementioned, my nearest relation shall possess the entail, always preferring the elder to the younger. And in case of there not being a male, and not otherwise, it shall devolve to the females my nearest relations, with a like preference of the elder to the younger;

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the possessor indispensably using whatever may be the said my surname and no other. And I *charge my said* Nephew *Don Henrique Edwards*, first called to the possession and enjoyment thereof, the out of the income of the said funds he may apply per annum, for the period of five years, one hundred pounds sterling therewith during the said period to attend to the good instruction of the first born son of his brother *Don Patricio Lynch*, in the event of *Don Henrique* not having sons; for, should he have any, he shall only employ for the aforesaid purpose thirty pounds in each of the aforesaid five years.

"I order that the debt due to me by *Don Pedro Beighbeder and Company* of the City of *Xerez de la Frontera*, after deducting what I may bequeath therefrom in the following clauses, may be divided to my testamentary executors amongst my poor countrymen and countrywomen in real distress in this city

"I order that out of the property which I have in the funds in England no part shall be disposed of, except it be to purchase lands in the said county of Mayo in Ireland, with the friendly aid of the house, under the firm of *John William Lubbock and Co. of London* so as to guard against any inposition in the title deeds, and with the express condition, that the same is to be entailed according to the terms permitted by the laws of Ireland.

"I appoint as my testamentary executor *Don Henrique Fallon* in the first place; and, should he not be living, *Don Thomas Hemming* respectively this city, merchants, to whom I give the power

testamentary executor, in form for him in the fixed period of four months to conclude and terminate this commission at all events, proceeding within that time to the sale of the house possessed by me in this city at the most advantageous price which he shall hold *at the disposal and order of my heir Don Henrique Edwardo Lynch, as well as every thing else belonging to me.*

“ All the residue of my property, rights, and actions, after every thing hereinbefore mentioned shall have been carried into effect, I leave to my aforesaid own nephew Don *Henrique Edwardo Lynch*, firstborn son of my brother Don *Patricio Lynch*, and of *Dona Maria Blake, who is to have the said rest or residue, as my heir, for such I institute* him under the obligation of paying immediately and without the least delay to my sister *Dona Juana Lynch de Blake* one thousand pounds sterling; and to her two sons Don *Roberto* and Don *Juan Blake*, had, in her marriage with Don *Isidoro Blake*, a further sum of one thousand pounds of the money to each. He shall also pay one thousand pounds sterling to Don *Patricio Lynch*, and one thousand pounds of like money to Don *Juan Lynch*, both of them my nephews, and likewise sons of the aforesaid Don *Patricio Lynch* and *Dona Maria Blake*; and I request the aforesaid Don *Henrique Edwardo Lynch*, my nephew and heir, to assist with his advice his two other brothers, disposing them to be careful in improving the property by me left to them, and any that they may obtain from their parents, so as not to come to indigence, as they have no other hopes or assistance

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than these properties and their good conduct. wherefore I recommend to them, and I hope that the same will be done by Don *Henrique Edwards* to conduct themselves well, be particular in their deportment, application, and honour for their own benefit.

“ I desire that the *debts due* to me in account current at the time of my death by the houses in London of John William Lubbock and Co., James Campbell and Co., and Messrs. Baring, Brothers and Co., or any others that I may have to receive in any place whatever, may be punctually recovered by my aforesaid nephew Don *Henrique Edwards* or whoever may have his special power, or his testamentary executors, or heirs ; and what shall be owing to me in Spain shall be recovered by my testamentary executor, and the balance shall be held by him at the disposal of my aforesaid nephew charging him, as I do hereby charge him personally if possible, to attend to the recovery of the balance in London, or any other place in England and Ireland, so as not to fall into bad hands there, and not to take any paper not having the responsibility of the debtors to avoid any imposition, *he being a man who is not acquainted* with business ; and, upon recovery thereof, he shall forthwith make the payments of the money by me disposed in the next preceding clause ; and I farther impose the obligation, that he shall likewise give to my niece Don *Eliza Lynch de Crane* one hundred pounds sterling, and fifty ditto to the daughter by the late marriage of my aforesaid brother.”

An act on petition was entered into on the par

of Henry Edward Lynch on the one side, and Henry Fallon on the other:—on the part of the former it was alleged, that he was the nephew of the deceased, heir and residuary legatee named in the will; and also the executor according to the tenor for all the personal estate and effects of the deceased, save his property in Spain; and that Henry Fallon was the executor for the will of the property of the deceased in Spain, but no further or otherwise; and accordingly prayed the Court to grant probate of the last will of the deceased, save as to the effects in Spain in him.

On the other side it was alleged, that the testator had by his will constituted Henry Fallon general executor for all his property, whether in Spain or elsewhere; and that Henry Edward Lynch was according to the tenor of the will appointed executor limited to the sole purpose of recovering debts due to the deceased in account current at the time of his death by the houses in London, of John William Lubbock and Co., James Campbell and Co., and Messrs. Baring, Brothers, or any others that he may have to receive whatever, except in Spain; and he consented that probate so limited should be granted to Henry Edward Lynch, and that probate was prayed of the rest of the goods, chattels, and credits of the deceased within the province of Canterbury, to be granted to Henry Fallon.

Swabey and Lushington for Mr. Lynch.

There is no instance of a person being appointed an universal executor in one and the same instrument, in which another is an executor according to the tenor.

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Great care should be taken not to confound terms. The person may be universal executor; but the term *general executor* is unknown to the Civil Law. Mr. Lynch is regularly instituted heir:—this appointment of itself, according to the Civil Law makes him executor;—he succeeds to all the rights of the deceased, and is consequently entitled to have the sole management of his property in England.

Jenner and Phillimore for Mr. Fallon.

The heir of the Civil Law was necessarily vested with all the functions of executor. The term *executor* was not then known, it is the growth of a more barbarous age;—with us in England even so late as Swinburne's time, no will, properly so called, could subsist without an executor, who unquestionably was analogous to the heir of the Civil Law. Modern practice has introduced a great change in this respect; and any dispositive paper is held to be a will, whether an executor is appointed in it or not: but the appointment of an executor may be absolute or qualified—may be with or without restrictions, may be limited to particular effects, or to particular countries. Here the intention of the testator, in the same clause, ascribes different functions to his heir and to his testamentary executors; clearly pointing out that one was to inherit his property, the other was to have the general superintending of it. The Court will give effect to both terms.

JUDGMENT.

SIR JOHN NICHOLL.

This question arises on the will of Henry Lynch—an act of petition has been entered into in which the facts stated are, that the will was executed on the 10th of December 1819, in due form, and that the testator died possessed of very considerable property.—Henry Fallon is appointed his testamentary executor, and Edward Henry Lynch his nephew his residuary legatee and heir.—On the part of the nephew it is contended, and truly so far contended, that he is an executor according to the tenor for certain purposes ; and further, that Mr. Fallon is only executor for the property in Spain. On the part of Mr. Fallon it is asserted that he is an executor in England as well as in Spain, except as to the specified parts of the property which are entrusted to Mr. Lynch.

The point in dispute is, whether Mr. Lynch is entitled to a general probate, or only to a limited probate.

This depends on the construction of the will itself, for the Court is from that to collect the intention of the testator. By the *sixteenth* clause *he appoints Mr. Fallon testamentary executor in the first place ; and, should he not be living, David Thomas Fleming respectively of this city, merchant, to whom I give the power of testamentary executor in form for him in the first period of four months, to conclude and terminate this commission ; at all events proceeding within that time to the sale of the house possessed by me in this city at the most*

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advantageous price, which he shall hold at the disposal and order of my heir Don Henrique Edwards Lynch, as well as every thing else belonging to me.

What might have been the question if he had only appointed an heir, or if he had appointed an heir and a residuary legatee, are very different considerations from this, where a person is to hold property for the benefit of the heir. This will then appoints Mr. Fallon general executor;—this would constitute him an universal executor: the appointment may be limited by other directions in the will; but they must be clear, either by express words or certain implication, to be limitations on the rights of the executor and the extent. In the subsequent parts of the will there is no express limitation; Mr. Lynch claims to be executor, according to the tenor of the will, of the property in England; he is made such by his appointment to such functions as necessarily imply that he is to act in that character; yet in a case of that sort the construction is *stricti juris*, and the intention of the testator is not to be carried beyond it.

Keeping this rule of interpretation in view,—what has he directed, and what is the course of his bequests? The will is broken up into paragraphs.

The *thirteenth* is material: it disposes of property in the funds which he values at \$3,000*l.*, and orders that it should be applied to the purchase of land in Ireland by the friendly aid of Messrs. Lubbock and Co.

he *fourteenth* directs how the funds, or lands purchased by the funds, are to be led : his nephew has only a life interest in

he *sixteenth* clause appoints a testamentary ator without any limitation as to his power.

is material to consider that in the *seventeenth* *eighteenth* clauses he gives his residue to his ew after " every thing hereinbefore men- d" has been carried into effect.—By whom? ainly by his testamentary executor ;—there is ing to limit the testamentary executor, the re- was to go to his nephew after all was done. ere any thing afterwards to extend the execu- hip to his nephew and heir? He is to collect his s in certain places—but what has he to do with roperty in the funds?—it does not seem that an be considered generally as his executor for roperty in England.—Mr. Fallon is gene- ' executor for the property in England, Mr. ch to a certain extent for the property in En- id.

ot only is this the due course of construing the ument : but it is perfectly natural that the tes- r should so have appointed it. He was willing ecure his property ; and, not having a high ion of Mr. Lynch's habits of business, he de- ed the general care of managing his property Mr. Fallon.

pon the whole I am of opinion that Mr. Lynch ly entitled to a limited probate as executor rding to the tenor for the purposes pointed

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out in the *seventeenth* and *eighteenth* paragraphs of the will, and that Mr. Fallon is to be considered as the general executor.

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FAWCETT v. JONES, and CODRINGTON and
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A citation taken out by the substituted residuary legatee in a will against the executors who had obtained probate, to shew cause why the probate should not be revoked on account of the residuary clause not being co-extensive with the instructions given by the party deceased.—The allegation founded on this citation rejected.

HENRIETTA Laura Pulteney, Countess of Bath (wife of the Right Hon. Sir James Pulteney, Bart.), died on the 14th of July, 1808, without issue, leaving a will dated the 5th of November, 1794, in which Sir Thomas Jones, Bart. and Christopher Codrington, Esq. and John Kipling, Esq. (a) were executors, and a codicil dated 24th July, 1805.

Sir Thomas Jones and Mr. Codrington, on the 22nd of August, 1809, proved the will and codicil in the common form. On the 1st of July, 1809, a citation was taken out at the instance of Elizabeth Evelyn Fawcett (formerly Markham), the wife of John Fawcett, Esq. the substituted residuary legatee against the executors, to shew cause why the probate should not be revoked on account of the

(a) Mr. Kipling had not acted as executor; and, after the commencement of this cause, he appeared personally in Court, and renounced the probate and execution of the will.

ary clause in the said will not being co-ex-
 re with certain heads and instructions for the
 vill, executed by the deceased on the 3rd of
 1st, 1794, and a new probate taken of the said
 nd codicil, together with that part or clause of
 foresaid heads or instructions which respects
 disposal of the residue of the deceased's per-
 estate, as containing together the true last
 nd testament of the deceased.

re probate was brought in ; but afterwards on
 motion of counsel was delivered out of the re-
 y to the proctor for the executors, on an un-
 king in acts of Court to return the same when
 ired, such re-delivery of the probate being
 : without prejudice to the question at issue in
 ause.

allegation was brought in on the behalf of
 Fawcett, which pleaded,—

rst, That the Right Hon. Henrietta Laura
 eney, formerly Baroness and afterwards Coun-
 of Bath (wife of the Right Hon. Sir James
 eney, Bart.) the party in this cause deceased,
 rted this life on the 14th day of July, 1808,
 ng behind her the said Right Hon. Sir James
 eney, Bart. her lawful husband, but without
 issue.

secondly, That on or about the 23rd day of
 , 1794, in contemplation of a marriage which
 then about to take place, between the said
 rietta Laura, then Baroness (afterwards Coun-
 of Bath), and the said Sir James Pulteney
 n Murray), Bart. certain articles of agreement
 e entered into between the said parties, where-

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by all the real and personal estates belonging to Lady Bath, except as therein mentioned, were agreed to be conveyed, assigned, surrendered, and transferred to Richard Lord Viscount Chetwynd, of the kingdom of Ireland, Christopher Bethell, of Swindon, in the county of York, Esquire, and Osborne Markham, of Lincoln's Inn, in the county of Middlesex, Esquire, their heirs, executors, administrators and assigns, upon trust, among other things, that they should make and execute such grants, assignments, transfers, surrenders and other dispositions of the said real and personal estate unto and to the use and for the benefit of such person and persons, and for such estate and estates and other interests, and subject to such powers, conditions, restrictions and limitations, as she the said Lady Bath, at any time or times, and from time to time, after the solemnization of the said marriage, by any deed or deeds, writing or writings, with or without power of revocation, to be sealed and delivered by her in the presence of, and to be attested by, two or more credible witnesses, or by her last will and testament, in writing, or any writing in the nature of a will, signed by her, and attested by three or more credible witnesses, should direct, limit, or appoint, which deeds, wills, and writings, she the said Lady Bath was thereby, and by the said Sir James Pulteney, her then intended husband, empowered to make and execute as she should think fit, as if she was sole and unmarried.

Thirdly, That during the time when the articles of agreement, mentioned in the next preceding article, were in preparation, and before the execution

thereof; the said Lady Bath being of sound and disposing mind, gave verbal directions to John Kipling, Esq., then and now one of the six clerks of the Court of Chancery, who acted as her legal adviser, to prepare a new will for her (in the stead of one formerly made by him for her) which she intended to execute soon after the solemnization of her said intended marriage. That, pursuant to such directions so received from the said Lady Bath, he the said John Kipling did prepare an instrument in the nature of heads or instructions for a will, to be afterwards extended in legal form, which he delivered to the said Lady Bath for her perusal and consideration a short time before the celebration of her marriage with the said Sir James Pulteney, which took place on or about the 24th day of July, 1794.

Fourthly, That after the said John Kipling had so delivered the said heads or instructions for a will to the said Lady Bath, he attended her at several different times, for the purpose of adjusting with her the heads or instructions for her will; and after the same had been adjusted, such heads or instructions were fairly copied by or by the order of the said John Kipling, it being thought expedient that the same should be signed and executed by the Lady Bath, in consequence of her being on the eve of departure for Scotland, to remain for some months, immediately after her marriage, and before a will or testamentary appointment could conveniently be extended in legal form pursuant to such heads or instructions. That upon the last sheet of the fair copy so made of the said heads or

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instructions, the said John Kipling caused to be written a memorandum, in the words following, to wit, "*The above instructions contained in this and the preceding sheets have been given by me to John Kipling, Esq., in order to enable him to prepare my will or testamentary appointment in nature of a will: but as it cannot conveniently be prepared and executed before my leaving London, I do therefore publish and declare this paper writing, contained in six sheets, as and for my last will and testament, or testamentary appointment in the nature of a will, pursuant to and in execution of a power reserved to me by my marriage articles, and of all other powers in me vested, or enabling me in that behalf; and direct that it shall have the same force and effect as if a will had been executed pursuant to these instructions.*" And soon afterwards the said heads or instructions were delivered by the said John Kipling to the said Lady Bath.

Fifthly, That the said Lady Bath, after receiving the said fair copied heads or instructions for her will, as mentioned in the preceding article, kept the same in her possession, and under her consideration for several days before she executed the same, and did with her own hand make some alterations therein. That the said Lady Bath, in her way to Scotland, paid a visit to Stokesley, in the county of York, the residence of the said Elizabeth Evelyn Fawcett, then Markham; and while there, to wit on or about the 3d day of August, 1794, she, the said Lady Bath, being of sound and disposing mind, and having an intention to give effect to the aforesaid instrument, contained in six sheets of

paper, as and for her last will and testament, or testamentary appointment, did duly sign, seal, publish and declare the same, as and for her last will and testament, or testamentary appointment, in the presence of several credible witnesses, three of whom, at her request, in her presence, and in the presence of each other, did set and subscribe their names as witnesses thereto, in manner and form as thereon now appears ; and she, the said Lady Bath, did give, will, bequeath, dispose, and do, in all things as therein is contained.

***Sixthly,* That in supply of proof refer to a paper writing annexed to an affidavit, made in this cause by the said John Kipling, dated 29th June, 1809, now remaining in the registry of this Court ; and doth allege and propound the same to be and contain the very instrument pleaded in the next preceding article as having been executed by the said Lady Bath.**

***Seventhly,* That the said Lady Bath, after having executed the said heads or instructions for her will, in manner hereinbefore stated, did transmit the same to the said John Kipling, accompanied by a letter in the words and figures following,—to wit :**

Stokesley, 4th August, 1794.

Sir,—I send you by this day's mail coach the instructions for my will ; I have been very unwell, which has prevented my returning them sooner. I hope you will receive them before you have sent off the will itself ; as you will perceive I have made a very material alteration in the last

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folio, which, of course, must be made also in the will.

I am, Sir,

Your obedient humble servant,

Pulteney Bath.

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P.S. I beg you to direct your answer to Edinburgh."

Which instrument and letter were duly received by the said John Kipling ; and the party proponent doth further allege and propound, that the twenty-seventh and twenty-eighth lines from the top of the sixth sheet of the said heads or instructions pleaded and referred to in the preceding article, were obliterated and struck through in manner as they now appear, by the said Lady Bath, prior to the execution of the said instrument, being the alteration alluded to by her in the aforesaid letter.

Eighthly, That the said John Kipling, having received directions from the said Lady Bath to cause the said heads or instructions for her will to be extended in proper legal form, and being himself at the time much engaged by other business, applied to the late Mr. Holiday, a conveyancer of eminence, in order to recommend him some proper person to frame a will for the said Lady Bath pursuant and in conformity to the heads or instructions which had been so as aforesaid executed ; and in consequence thereof, the said Mr. Holiday recommended for that purpose a draftsman, whom he had been used to employ, namely, Christopher Wightman, of the Temple, London, to whom some time in the beginning of the month of August,

1794, the said John Kipling did deliver the heads or instructions for a will hereinbefore pleaded and executed by Lady Bath, in order that he, the said Christopher Wightman, might prepare a will, strictly conformable thereto, in proper legal form.

Ninthly, That soon after the premises mentioned in the next preceding article the said Christopher Wightman did, from the heads or instructions so delivered to him, prepare a draft of a will or testamentary appointment for the said Lady Bath; and having so done, he delivered the said draft to the said John Kipling for his perusal and approbation; and the same having been inspected by the said John Kipling, *but the difference therein between the said draft and the said heads or instructions having, in it, escaped his observation, he caused two fair copies thereof to be made for execution, which were delivered or transmitted to the said Lady Bath.*

Tenthly, That soon after the two fair copies of the draft of the said will had been received by the said Lady Bath, she directed an alteration to be made by tending the bequest of the residue of her personal estate to or for the benefit of the said Elizabeth Evelyn Fawcett, formerly Markham, and her issue, to take effect as well in the event of there being only one daughter, and no other child of her, the said testatrix, as in the event expressed in the said instructions of there being one only son; and further, to bequeath the said residuary personal estate, in default of issue of the said Elizabeth Evelyn Fawcett, formerly Markham, to an only child of the said testatrix, whether son or daughter, in preference to the brothers and sisters of the said

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Elizabeth Evelyn Fawcett ; but did not discover the omission and difference between the said fair copies and her original heads or instructions so executed by her as before pleaded, and in conformity with which she had directed the same to be prepared for execution. That the alterations so directed by testatrix were accordingly made in the residuary bequest by the said Christopher Wightman or by his clerk, which rendered it necessary to take away some of the sheets of the said two fair copies and to substitute other sheets in lieu thereof, in order to give effect to such alterations.

Eleventhly, That after the aforesaid two fair copies of the said will had been altered in manner mentioned in the next preceding article, the said Lady Bath being of sound and disposing mind, and having an intention to execute the same as and for her last will and testament, did, on or about the 5th day of November, 1794, duly sign, seal, publish, and declare, each of the said two copies or parts of a will, as and for her last will and testament in the presence of several credible witnesses, three of whom, in her presence, at her request, and in the presence of each other, did severally set and subscribe their names as witnesses thereto.

Twelfthly, That after the two parts of the will had been executed, as pleaded in the next preceding article, the same were sealed up in envelopes or covers ; and immediately afterwards one part of such will was delivered to the said John Kipling, and the other part thereof was left in the possession of the said Lady Bath.

Thirteenthly, That in supply of proof of the

premises mentioned, and set forth in the preceding article, the party proponent prays leave to refer to the last will and testament of the said Lady Bath remaining in the registry of this court, upon which a probate issued on the 22d August, 1800, and doth allege and propound the same to be one of the parts of the will, so executed by the said deceased on the 5th day of November, 1794, being that part which was so as aforesaid delivered to the said John Kipling, sealed up, and which remained in his custody and possession so sealed up, until and at the time of the death of the said Lady Bath.

Fourteenthly, That at the time when the said Lady Bath so executed her said will, on the 5th of November, 1794, she apprehended and believed that the bequests therein contained, were in strict conformity with the heads or instructions which she had formerly executed, save and except in so far as she had directed the residuary bequest to be altered in manner as pleaded in the tenth article; and neither the said John Kipling, nor the said Christopher Wightman, the draftsman, employed under him, had ever received any instructions whatsoever different from or other than the heads or instructions hereinbefore pleaded, and the said alterations in the residuary clause, as specified in the said tenth article.

Fifteenthly, That no omission in the said will, or difference between the said will, and the heads or instructions for which it was drawn, other than the alterations specified in the tenth article, was discovered during the lifetime of the said Lady Bath; but that since her death it hath been found that

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the clause inserted in the said will, for disposing of the residue of the said deceased's personal estate, in the event which hath happened of her dying without leaving any issue, differs from and is not co-extensive with the clause in the instructions applying to the said residuary bequest in the same event, inasmuch as that by the said will the said Lady Bath, after the death of Sir William Pulteney, her father, and Sir James Pulteney, her husband, and the death of the survivor of them, directed her trustees thereinbefore mentioned to apply her said residue, and the interest and dividends thereof, for the sole and separate use and benefit of the said Elizabeth Evelyn Fawcett, formerly Markham, and for the use and benefit of the issue of the said Elizabeth Evelyn Markham, in the case only of the said testatrix having one child living at the time of her own decease, (as in and by the said will, reference being thereunto had, will more fully and at large appear) whereas, by such heads or instructions, the said testatrix ordered and intended her said trustees, after the death of Sir William Pulteney, her father, and Sir James Pulteney, her husband, and the death of the survivor of them, to apply the interest of her said residue to the separate use of the said Elizabeth Evelyn Fawcett, formerly Markham, for her life; and after her death to her children and grandchildren, as she, the said Elizabeth Evelyn Fawcett, formerly Markham, should appoint, in the case of the default of younger children of her the said testatrix, meaning thereby whether such default of younger children arose from a total failure of issue of the said testatrix, (which

is the event which hath happened), or by her leaving an only child, as in and by the said heads or instructions, reference being thereunto had, will more fully and at large appear. And the party *proponent doth expressly allege and propound that such difference in the said will arose solely through the error and inadvertency of the said Christopher Wightman, the draftsman, employed to prepare the same, and from the said John Kipling having relied too much on the accuracy of such draftsman, and not having taken sufficient time to peruse and consider the said draft, as compared with the said heads or instructions.*

Sixteenthly, That on the 22d day of August, 1808, a probate of the said will of the said deceased, bearing date the 5th day of November, 1794, with a codicil thereto bearing date the 24th day of July, 1805 ; but without the said heads or instructions for a will executed as aforesaid, on the 3d day of August, 1794, was granted under seal of this court to Sir Thomas Jones, Bart. (then Thomas Jones Esq.) and Christopher Codrington, Esq., two of the executors named in the said will ; a power being reserved of making the like grant to John Kipling, Esq., the other executor.

Seventeenthly, That the party proponent doth herein and hereby propound the said will of the said deceased, bearing date the 5th day of Nov., 1794, and the said instrument of instructions for the same, executed by the said party, deceased, on the 3d day of August, 1794, as containing together the true last will and testament of the said deceased,

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to which there is a codicil, dated the 24th day of July, 1805.

Eighteenthly, That the said Lady Bath had through her life the most unbounded affection and friendship for the said Elizabeth Evelyn Fawcett, formerly Markham, who was her cousin, and brought up much with her in their youth. That such the said Lady Bath's attachment towards the said Elizabeth Evelyn Fawcett continued equally strong after her marriage with her present husband, John Fawcett, as it had been while she was the wife of the Reverend George Markham, Doctor in Divinity; and such her affection and friendship continued to the day of the death of the said Lady Bath, who frequently spoke of the said Elizabeth Evelyn Fawcett and her children, as being the principal objects of her testamentary bounty.

Burnaby and Daubeny, for the executors— opposed the admission of the allegation.

The question divides itself into two parts,—*first*, whether there has been that omission in the will of the deceased, which it is now proposed to rectify; and, *secondly*, whether the Court would have the power to rectify it, should it be established.

In regard to the *first*; if there be in fact no omission or defect in the testator's meaning, there can be no need for this extraordinary interposition of the Court. The will is not impugned upon any of the usual grounds on which wills are objected to in this Court; is not contested on the ground of any fraudulent imposition practised on the deceased, or the want of capacity, nor on the ground of imperfection in the

substance of the instrument ; for if it were an imperfect testament the presumption of abandonment might arise, and we should be placed in a situation very different from that in which we now stand before the Court ; we should be called upon to support a paper presumed to be abandoned, by the aid of parol testimony introduced to establish the intention of the deceased, and not to resist the introduction of evidence for the purpose of making an addition to a regularly and solemnly executed paper.

With regard to the second question, whether the Court has the power to rectify an omission of this description, that must depend on whether parol evidence can be received to controul or vary, in any respect whatever, a will which is not impeached, on any other ground. Before the statute of Frauds it seems to have been a general rule, that no parol evidence could be admitted to controul what appeared on the face of the deed or will, not only from the danger of perjury, but from the presumption, that whatever the parties had at the time in contemplation was all reduced into writing, the last solemn act of the testator must be taken to be that which contained his intent, and his whole intent ; and no antecedent act can be considered as being any part of it.

In *Ulrick v. Litchfield*, (a) there was a doubt on the face of the will, to whom the testatrix had left the residue of her property, and there was a repugnancy in the words of the will : but Lord Hardwicke refused to admit parol evidence ; and stated that there were only two cases in

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(a) 2 Atkins 372.

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ought to be admitted, either to ascertain where there are two of the same name, where there has been a mistake in a Christian name, or in the case of a resulting trust;—he said, the case before him was not one of a resulting trust, but one in which it was attempted to resort to parol evidence, to explain a doubt on the face of the will; and he referred to the case of *Strode v. Russell*, (a) in which there was an appeal to the House of Lords. And Mr. Justice Tracy, who assisted Lord Chancellor Cowper on that occasion, was at first inclined to admit evidence to explain: but, upon more mature consideration, disavowed his first opinion, and was clear that it could not be admitted to supply the words of a will.

Afterwards in *Blinhorne v. Feast*, (b) Lord Hardwicke, referring to the case of *Brown v. Selwyn*, which had recently occurred in the House of Lords, appeared doubtful as to the propriety of receiving parol evidence, even to that point; for he says, “Since the case of *Brown v. Selwyn*, where the Lords rejected parol evidence, I have been extremely tender of admitting it in questions of this kind, though I never doubted it where it was to ascertain identity, or in case of collateral satisfaction.” And in *Nourse v. Finch*, (c) Mr. Justice Buller says, “In a case of *ambiguitas latens* parol evidence may be admitted; so in a case of fraud, perhaps of ignorance, or mistake: but it does not follow, that it ought to be allowed to prove the intent of any written paper, for that ought to be collected from the paper itself.”

(a) 2 Vern. 621. (b) 2 Ves. Sen. 28. (c) 1 Ves. Jun. 344.


In *Lord Walpole v. The Earl of Choldmondeley*, (d) argued in a bill of exceptions from the Common Pleas, Hilary Term, 1797, before the King's Bench, Lord Kenyon rejected parol evidence altogether, on the ground that there was no latent ambiguity, and that, in fact, if it was to be received, it would raise a difficulty which, perhaps, did not exist before. In that case a will made in 1752 was revoked by another will made in 1756; but there was a codicil made in 1776, which recognized the will of 1752, and appeared to revive it. There were strong circumstances to shew, that the deceased did not mean to recognize the will of 1752, but that of 1756: but there being nothing on the face of the will to raise a doubt, the Court rejected parol testimony altogether, and pronounced for the will of 1752.

The practice in our Courts has been in conformity with the doctrines which result from these authorities, as in the case of *Lord St. Helens v. The Marchioness of Exeter*. (e) A codicil referred to a will of the 10th Jan. 1798; no such will was found: it was held that there were latent circumstances, requiring evidence to explain these, and therefore evidence was admitted.

In *Treacher v. Favell*, (f) a will, dated in 1790, referred to a fact which had happened subsequent to that period. There was another subsisting will dated in 1793; it was clear the first will was not written in 1790:—it was held an imperfect paper, and evidence was therefore admitted to ascertain the date.

(d) 7 T. R. 138. (e) Prerog. Jun. 27. 1805. (f) Prerog. Feb. 29th. 1804.

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Upon the whole, the preliminary step is not made out; the Court cannot be satisfied of the necessity of an interposition: but even if this point were established, it would be a most dangerous precedent to admit this allegation which has for its object, after a lapse of 15 years, to supply an omission, which may have been made by Mr. Kipling, but which can now be rectified by his evidence, and his evidence alone.

Stoddart and Jenner, for Sir James Pulteney, pursued the same line of argument as the counsel for the executor. Lord Cheney's case, 5 Coke 68. Buller's Nisi Prius 297. Castledon v. Turner, 3 Atkyns 257. Lowfield v. Stoneham, (before Chief Justice Lee). Cave v. Holford, 2 Ves. Jun. 604. And the case of Sir John Chichester's will. (a)

Swabey and Addams for Mrs. Fawcett.

In opposition to this allegation, two questions are raised:—*first*, whether there is a mistake, such as it is proposed, to rectify; and undoubtedly, if there is not, there can be no reason for the interference of the Court: but we apprehend that it is impossible to compare these instructions with the will subsequently executed, and not to see that the draftsman has omitted that very contingency, upon which the interest of Mrs. Markham and her children is directed by the instructions to vest; that being that after the death of the survivor of her father and her husband, the estates shall go to her younger children, and in default of such issue to Mrs. Markham and her children, which certainly

(a) Sandford v. Vaughan, 1 Vol. 128.

is not to be found in the will. There is a provision for all other contingencies but that,—that is, the will does not provide for the event of her Ladyship dying without leaving any younger child ; and this is the omission we ask to supply.

We ask to be permitted to supply this by evidence which is instrumental as well as parol, upon the ground that the Court has not at present before it by the instrument which has been proved the genuine intention of the deceased, for that does not contain her whole and complete intention. We conceive, also, that if the evidence of which the allegation appears to be capable shall be thought sufficient in point of fact, that clause of the instructions which I have very recently read in addition to the will may be admitted to probate, without producing any contradiction to the will, as it at present stands ; as also without the violation of any principle of law justly applying to a case under these special circumstances.

This necessarily leads to the *second* consideration, which is, whether assuming that there is that omission or mistake for which we contend, and which it is proposed to rectify, the Court has the power to rectify it ;—for it has been argued, that the Court does not possess that power: without wishing at all to deny the soundness of the cases cited from the books of another profession, we resist the application of those cases to *this particular instance* ; and if search had been made into the decisions of the Prerogative Court, it would have been found, that the same principle has been constantly acted upon, and as scrupulously adhered to, in the

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decisions of that branch of jurisdiction over subjects of testamentary law, as in the Court of Interpretation. It has been derived by both jurisdictions from one and the same source; and we cite one decision to this effect, *viz.* the case of Mrs. Wenman. 200*l.* was given to a Mr. Clark to transmit to Mr. Wenman: Mr. Clark was about to undergo inoculation, previous to which he made his will, and bequeathed this 200*l.* to Mr. Wenman. He recovered, and did not alter his will; but afterwards he gave the 200*l.* to Mr. Wenman,—afterwards died, and his representatives sued for the 200*l.* under Mr. Clark's will. It was resisted on the ground of these circumstances: but they being all circumstances before the will, and being adduced merely to controul the construction of it by parol, Sir George Hay over-ruled it on the authority of *Selwyn v. Brown*, and many of those cases which have been cited fully affirming those principles which equally prevail in all courts of construction.

But we are now before a court of probate, of which I apprehend it is the peculiar office to see that the testamentary paper should be such as the testator intends to take effect; for though no form is necessary, provided intention be expressed, yet intention being the very essence of a testamentary disposition cannot be dispensed with. Nor is the intention only necessary, but it constitutes and makes itself the will in all cases; and the evidence requisite to satisfy a court of probate what a testator intends, and what he does not intend, except in cases of nuncupation, that is, as applied to all written testa-

taments, is not to be reduced to certainty by any particular rules Courts can lay down. It will always depend upon the circumstances of each particular case, on which the Court will exercise a full discretion as to their result; and that parol evidence in a case of the present description is admissible, appears to be a position not admitting of a particle of doubt;—are we not in the daily habit of admitting it to prove every paper of a testamentary nature? at the same time we know it is a general rule where it is to controul the construction of what appears upon the face of a will or deed, that it is admitted only to explain an uncertainty, and to rebut an equity before a court of equity; but in a court of probate it is of necessity more liberally indulged. It is indeed the principal evidence on which the validity of testamentary acts can be decided. When a paper is once established, and it is pronounced to be what it purports, Courts undoubtedly entertain a great deal of jealousy in suffering a party to travel out of the paper to ascertain a different sense from the immediate purport of the words, and then to enquire what is the meaning of the testator. But what is the business of this Court, but to find out the will of the testator, and whether the paper propounded as such is his will?—how otherwise is it possible for the Court to decide, when two papers are propounded by different parties, which shall be received—it could not go on without proof *dehors* the will in order to discover to which the stamp of its authority is to be given; and it would be inconsistent to say you shall not in such cases

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go into evidence of the fairness of the transaction, and enquire whether you have the whole will before you or not.

It has been admitted that where there is force, fraud, or incapacity, parol evidence may be admitted ; but it is contended that it cannot be admitted to intrench upon a regularly executed act, because the Court is to decide upon intention, and wherever there is either force, fraud, or imposition, intention is wanted.

In like manner where there is a will which has been altered by change of circumstances, as by marriage, and the birth of a child,—would not parol be admitted ? And why would it be admitted there ? Because there the Court decides on intention, on a presumption that the intention the testator once entertained had become altered. It may also happen that you have a later executed instrument, and an instrument, of an earlier date, remaining uncanceled ; and there have been cases where by parol merely the testator has revived the one, and it has been on that evidence pronounced for as the true will of the deceased ; that is from circumstances *dehors* the will, and by parol merely. And as nothing is to be admitted into the will which is not the intention of the testator, so whatever is found to be such must be admitted : and there have been many cases decided on solemn argument, wherein there being instructions or written proofs, those written proofs being corroborated by parol testimony, have afforded ground for pronouncing for the two papers together, and of supplying the omissions of parties as well as of expunging mistakes in written in-

struments, when that which was inserted has been proved not to accord with the true intent of the testator.

In the case of *Bridge v. Arnold and Cranke*, (a) the words which were expunged had been inserted by error. The case was of this description:—the surplus had been given in trust, and there had been incorporated by a mistake of the attorney these words, “for the benefit of the trustee,” or rather, I believe it had been given to him for his own use and benefit, instead of “as a trustee;” and it was proved, the testator had given directions to insert those words “as a trustee.” It was contended in that case, that parol evidence could not be admitted against what appeared to have been the words of the testator: but the Court said it was manifestly an error, and that the testator was ignorant of those words being inserted, and therefore they could not bind; and the Court directed them to be expunged, as my note says, “following the intention of the deceased.”

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Barton v. Robins, (b) which afterwards went to

(a) Prerog. 1775.

(b) The following report of this case, as far as relates to the proceedings in the Prerogative Court, is taken from a MS. in the handwriting of the late Dr. *Swabey*:—

PREROGATIVE COURT.

BARTON v. ROBINS.

Dr. *Wynne*.—Not sufficient evidence to support the will;—eye-sight bad. Sarah Barton and Moore say not able to read. In point of law a will of a blind person not good, unless all read. The evidence is—this will was not all read. Sarah Barton says, Can you read it?

Total deficiency of proof that Robins was appointed executor and residuary legatee. Swinburne on Blindness. Domat. Law in Code, 6th Book, 22 Tit. 8th Law. Case of *Moor v. Pain*, in

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the Delegates, was the case of an insertion by fraud. It was the case of an old woman who had nearly lost her sight, and the attorney who drew

the Delegates. Blind man's will set aside for want of the form of reading over. Robins had disoblged her ;—evidence of four witnesses as to that.

Curia. (Sir GEORGE HAY.) A very special case ;—had very little doubt if it had not been for the evidence on the part of the next of kin,—Moore, Barton, Beavan. Until the said Robins had done reading, heard nothing of an executor,—Barton, and other legacies,—Mrs. Beavan. Will begun, not finished ;—heard nothing but legacies. If they had not proved a part to have been read, it would have been incumbent on Robins to have proved the will to have been read over. *Parminster and Butler, or Butler against Parminster, the whole will set aside, chiefly because the deceased being a paralytic, and not able to read it over, the contents were not known by the deceased or proved to be read over, and the writer was the residuary legatee.* The ancient law, that the writer shall have no legacy not received here it is true : but then there must be an evidence that the contents are known. My opinion is, that the part not proved to have been read over will be void. A blind man's will established upon a proof that he knew the contents of the will, though not read over before the witnesses. I must look on the deceased as a person blind :—incumbent upon Robins to shew he was executor or residuary legatee. Samuel Webb—That deceased said to Robins she desired to have a handsome funeral, but a single witness. Gaby says,—The deceased said you will do the best you can. What are the collateral circumstances ? That he should have a benefit ?—nothing more unlikely ;—not a tittle of evidence that she ever designed any favour to Robins, he being a stranger, an attorney, and nothing to shew intention to benefit him. Why did not Robins go on the 30th ?—the father went ;—not a word said by the father about his son being executor, or having the residue. A moidore given to Robins ;—it is a material circumstance. I can easily account why Robins should decline the moidore ; but cannot why the deceased should press him three times, had she known or intended him to be her residuary legatee. *In point*

the will had inserted the residue to himself. The old woman had some suspicion; she sent for the attorney, who made excuses for not coming; and she

of law, the writer, who is benefited, must shew that the contents were known. No proof but Webb;—that only as to executor;—it would have done if he had not the residue. Pronounce for so much of the will as does not benefit the writer.—*Expunge the residus.* Revoke the probate, and decree administration with will annexed to the next of kin. No costs. I put it for defect of evidence. There are *suspicious circumstances* in the case.

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The decree from the minutes.—Pronounced for the force and validity of so much of the will as relates to all the legacies bequeathed in the will, except the legacy of the residue to Henry Robins, the writer of the said will, and the appointing of him as an executor; and did also pronounce for that part desiring Mr. Robins to take care of the funeral; but did pronounce against the force and validity of so much of the said will as bequeathed the residue to the said Henry Robins and appointed him executor, and revoked the probate heretofore granted of the said will,—and decreed the said deceased to have died intestate as to the residue of her personal estate; and decreed letters of administration with so much of the said will as is pronounced for only, omitting from the words “all the rest, residue, and remainder,” in the seventh line, to be computed from the bottom of the said will, to the words “fully executed” in the fourth line, to be computed from the bottom of the said will, to be granted to Mary Barton, Holman’s client, the cousin-german and next of kin of the deceased.

From this sentence an appeal was interposed to the High Court of Delegates, which on the 18th Nov. 1769, affirmed the sentence of the Prerogative Court, and condemned the appellant in costs. The Judges present were Mr. Baron Smythe,* Mr. Justice Aston, Dr. Ducarel, and Dr. Bever.

* Mr. Baron Smythe is styled in the Court Book of the Delegates, the Honourable and Reverend Sir Sidney Stafford Smythe, Knight, one of the Barons of his Majesty’s Court of Exchequer.

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never could obtain the will from him ; he kept it back, under pretences of different kinds. The Court had no doubt, in that instance, as to the receiving parol evidence ; and, on the evidence of these circumstances, ordered the clause of the residue to be struck out. These are cases in which clauses were expunged on parol evidence merely.

The case of *Damer v. Pechell* and others, (c) appears to be precisely similar to the present. Mr. Janssen had written instructions for his will, which he had given in his own handwriting to Mr. Robinson, his attorney, in which there was a clause appointing his younger daughter residuary legatee. Mr. Janssen put this at the top : Mr. Robinson intending to put it at the bottom, in his hurry he passed it over, and omitted it altogether. Mr. Janssen, after inspecting the draft drawn out by Mr. Robinson, returned it to be engrossed, which was done accordingly, and he afterwards executed it. The executor was called upon to take probate of the instructions as part of the will, and Doctor Calvert pronounced for them as such. The cause was appealed to the Court of Delegates, (d) who

(c) Prerog. 1778.

(d) I am indebted for the following epitome of this case to an advocate of great experience in the Ecclesiastical Courts, from whom I have derived much information and advice in the compilation of these Reports.

Delegates, 14 Feb. 1783. Mr. Justice Willes, Mr. Baron Eyre, Mr. Justice Nares, and Dr. Macham.

BLACKWOOD v. DAMER.

M. Janssen wrote with his own hand instructions for a will in which he left the residuum to his youngest daughter, since

thought the mode in which the sentence was given, including as it did the whole of the instructions, was not correct, but declared for the clause appointing the daughter residuary legatee, together with the executed will, as containing together the last will of the deceased.

There is a case very similar to that which is much more recent, in this Court, of *Gerrard v. Gerrard*, (*e*) by her guardian. It is the case of a will of a Dr. Gerrard. A caveat had been entered by Mrs. Gerrard on behalf of the daughter, not as opposing the will, but submitting to the judgment of the Court whether certain words ought not to be introduced into the will on evidence of the intention of the deceased. The facts of the case were, that Dr. Gerrard died, leaving his widow and a daughter. That in June, 1787, he had written instructions for his will, and

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married to the Honourable Lionel Damer. The attorney, in writing over the will, omitted the residuary clause; some other variations were made; the draft was read over to the testator, and left in his custody two days: the will was executed in due form—contained legacies to the executors. The testator always afterwards expressed himself as having left the residuum to his youngest daughter. The attorney deposed, that it was merely an omission: the other variations he supposed he had received verbal instructions to make.

The Court below had pronounced for the instructions as part of the will.

The Delegates decreed that the residuary clause should stand as part of the will, but no other part of the instructions.

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delivered them to Mr. Morrell, an attorney, of Oxford; and that, towards the latter end of the month, he had written to Mr. Morrell, desiring him to insert his wife as residuary legatee:—the term he used in his letter was, “my dear wife;” and it not being recollected, at that time, by Mr. Morrell, what was her Christian name, a blank was left for it in the will. The testator altered the draft in some trifling particulars, and then transcribed it, but still he omitted to insert the name of his wife; and having transcribed it, he afterwards executed it. Two witnesses were examined. Mr. Morrell deposed that he knew the handwriting of the testator, and he proved the instructions and the letter from which he drew the draft;—that he believed that he meant to make his wife executrix, and to give her the residue of his property that he had; and that he apprehended it must have been a mistake, and that the omission arose from his not observing the blank. It was also proved that the testator had subsequently stated that he had left his wife executrix and residuary legatee. The Court said it was impossible to prove any thing more clearly; and that as to its being said that if a man does not take sufficient care, he must abide by the consequences, the Court did not agree to that.—The case of Mr. Janssen’s will was then cited; and it was said that in point of principle the cases were the same, but in point of evidence, clearly they were not; and I think upon the letter, or one part of the instructions not having been propounded, it was said that the Court could

not pronounce for papers not propounded. But there have been cases of that sort :—there was one case before Sir George Hay, where he pronounced for a paper, although it had not been propounded, and the Court, in this instance, under the authority of the case before determined by Sir George Hay, declared for the validity of a paper which had not been propounded.

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There are other cases in the recollection of the Court:—that of *Micklin v. Franklin*, (*f*) where the testator had executed a codicil, merely intending to revoke a single legacy which appeared to be written from inadvertency only on a wrong will, which his codicil purported to revive. On evidence as to the circumstances being gone into, and the Court being satisfied it was from error, and not with an intention to revoke that will, the Court pronounced for the codicil; and the will of 1786 was received, directly against the contents of the codicil of 1789, which was an executed instrument.

The case cited of *Lord Saint Helens v. the Marchioness of Exeter* (*g*) was one of the same

(*f*) Prerog. 1789.

(*g*) PREROGATIVE COURT OF CANTERBURY.

Lord St. HELENS v. The Marchioness of EXETER.

JUDGMENT.

Sir JOHN NICHOLL.

An executed will and two codicils of the Marquis of Exeter are propounded. The will is dated on the 13th December, 1800;—the first codicil on the 1st December, 1802;—the second codicil on the 13th November, 1803.

The execution of these instruments is fully proved. The question arises upon the first codicil, which is all in the hand-

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description. That was a mistake as to the draft of a codicil, which stated itself to be a codicil

writing of the testator, and begins—"This is a codicil to my last will and testament, of the 10th January, 1798; and I do hereby ratify and confirm my said will." On the part of the executors it is alleged, that at the time of the execution of the codicil the deceased was at Burghley, and copied this from a form which he had procured from his solicitor, and inadvertently copied the date from a former will, which it is presumed has been destroyed, as it cannot be found. But the question is,—whether, being recited as a codicil to the will of 1798, the Court can pronounce it a codicil to the will of 1800, and can receive evidence to shew, in contradiction to the terms of the paper itself, that it was of a different date.

Undoubtedly this Court has the power, in some cases, of admitting parol evidence to prove intention. The rule laid down by Lord Bacon in his twenty-third Maxim is, "*Ambiguitas verborum latens, verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur.*" In Bacon's Abridgment (p. 653.) the case is put of a father having two sons, John and Thomas, the former of whom had died long before the making of the will, a fact well known to the father; and in the will he left a legacy to "John," the deceased son, instead of to Thomas, the living one; and evidence was allowed to be gone into to rectify this mistake. It is true that in this case, a will bearing date January 1798 had been made: but he afterwards married, and in 1800 made another will,—and in 1802 a codicil to that will. The will of 1800 is found duly executed, and carefully preserved sealed up, with this codicil also. The will of 1798 cannot be found, and is to be presumed to have been destroyed by the deceased. What is to become of the codicil of 1802? It is recited to be a codicil to the will of 1798; and confirms that from which the deceased had manifestly departed, by making another will:—these, surely, are latent ambiguities which may let in evidence to shew intention. The evidence shews that he could not mean to revive the will of 1798;—it appears that he clearly looked on the codicil of 1802 as that which should operate. Foulkes, who is principally benefited,

to the will of 1798, though intended by the testator to apply to a later will. I believe the former will no longer subsisted: there could be no doubt of the facts; they were facts which could be only supplied, and were supplied only by the testimony of Mr. Foulkes, his Lordship's solicitor, who was very much in his confidence. These cases are sufficient to shew that this Court, as a Court of Probate, is not bound to grant probate of every paper signed and attested without admitting parol testimony, as to the fact which always refers to the intention of the deceased, as well as whether there is a fair execution by the deceased, or whether there may have been error or fraud.

appears to have been a person much in his favour:—annuities are given which the codicil recites, that Sims was in the habit of paying in his life.


He sent to his steward to send this codicil to him in London, and therefore he could not consider it as done away by the destruction of his will; and having the copy of a codicil from his attorney, in which the recital was from a will of 1798, it was a natural ground for the mistake.

It is said that in the case of *Lord Cholmondeley v. Lord Walpole*, (7 Term Rep. 749.) the Court of Common Pleas refused parol evidence to explain intention, and that this was affirmed by the King's Bench. But in that case there was no error on the face of the paper; there was a perfect will remaining, and a codicil referring to that will. The evidence would have gone to establish another will.

Here the case is very different; the will to which the codicil refers does not exist, and the subsequent marriage made it highly proper that there should be another will. Having endorsed this a codicil to his will; having sent for it about two months before his death, and kept it with his will; I think there is just and legal ground for the Court to pronounce that he intended it for a codicil to the will of 1800, and to pronounce for it.

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There is very little distinction in principle between the allegation which was admitted in *Janssen v. Pechell*, and that now offered for your consideration; the prayer undoubtedly is not extended; —I do not know that it was in the other case,—I believe it was not. The citation was there to call upon the executors, to take probate of the will with the instructions: the Court pronounced only for the residuary clause in the instructions. Our citation asks for probate of the will, together with the residuary clause in the instructions. Undoubtedly we cannot go beyond that, but we are not obliged to go to that extent; and we probably shall ask the Court if we are urged to give our proof to pronounce for this in the manner I have before adverted to, and which will not interfere with the executed will, except so far as to supply that which we contend is wholly omitted. We consider that executed will as containing provisions for other contingencies, but not as embracing this.

This insertion undoubtedly would not at all interfere with the power this Lady enjoyed of disposing of her residue by will as a *femme coverte*; she must comply with the power given to her, and she must comply precisely. But we submit she will be found to have so complied by as many instruments as she shall have made, if they are deeds or wills, in the presence of a certain number of witnesses; her power of testacy then is not restricted. But it has been said there is an obstacle not at all to be got over in the case, for there is in the will a clause of revocation. It will be sufficient to reply, that in *Mr. Janssen's* will there was a

clause of revocation, and that can operate only so far as it was intended to revoke, and no further. The instructions, very fortunately in this case, appear to have received the solemnity of an act of execution, as well as the will, which is a strong part of the case, because we ask nothing to be taken in connexion with the will except what arises upon the face of those executed instructions; and it may be here remarked, that the authority cited from Swinburn appeared a special authority for one act only, and not to apply to an authority so large as that of Lady Bath.

It is said that, considering the different occasions on which these fair copies were before her ladyship, and that she made some alterations in the residuary clause after those fair copies had been communicated to her, she must have perceived this, and that having perceived it, and having executed the will, she must be considered as having adopted it in the state in which it stands:—we argue from the very tenor of those alterations made, that she meant not to restrain, but to enlarge, the beneficial interest which she had originally intended, to Mrs. Markham, and her family, by her instructions, and that she never varied from those instructions, except with an intention to increase it; and as to suppose that she might overlook it, I think that is not going a great way, when my learned friends and ourselves find no little difficulty, comparing the one instrument with the other, in saying, what has been provided for and what has not. With respect to the draft being extended from the instructions, as it is contended to be in legal form, all these long additions and am-

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plifications being added, as to the distinctions between different children, in whom property was to vest, at twenty-one, or marriage, or in case of survivorship, have led, most probably, to this omission, and that her Ladyship should not perceive, when Mr. Kipling did not perceive the omission of this particular clause, is not that at which this Court would express any very great surprise.

It has been said the Court ought to lean, since the statute of Distributions, in favour of the husband, in cases of this kind: that is an observation, I think, of no very great weight; for the Court will have no leaning but that of the law, and the leaning of the law is to follow the intention of the party. That it was not the intention of Lady Bath to give her husband more than a life interest is clear and manifest upon the will itself: there is no occasion to travel out of the instrument to discover that; for the very last clause she has added shews it. Supposing Mrs. Markham to die without leaving any issue whatever, she then inserts an only child of her own, whether son or daughter; the insertion seems merely to exclude (if there should be such a child) the brothers and sisters of Mrs. Markham; but if there shall be no such child, she then gives that interest which Mrs. Markham and her family would have to the brothers and sisters of Mrs. Markham; and the very postponing the interest of an only child to the event of this Lady dying without leaving any issue appears to me to create an inference too strong to fail of its effect as to the intention of this lady, and to shew that her intention of leaving this property to Mrs. Mark-

ham applied equally to that event which has taken place, she using the term "younger children" only in that part of her instructions, because no eldest whatever had even been mentioned; and it appearing from the whole tenor of that instrument, that an eldest was not at that time at all in her contemplation, the testatrix knowing, or at least thinking, that an elder child would be amply provided for by other means.

We trust, upon the whole, on the authority of *Janssen v. Damer*, *Gerrard v. Gerrard*, and the several other cases wherein it has appeared that the Court has exercised the power, not only of supplying facts, but of remedying the mistakes as well as the frauds of parties, that we are entitled to ask the admission of this allegation.

JUDGMENT.

Sir John Nicholl,

The question in this case arises upon the will of the deceased Lady Bath, who died in 1808. The will is dated on the 5th of November, 1794, and the codicil on the 25th of August, 1805. Probate of the will and codicil was taken out by the executors named in the will. That is called in, nearly twelve months afterwards; and the executors are cited to take a new probate of the will and codicil, and of some executed instructions, *as together containing* the will of the deceased. The circumstances of the case are very fully stated in the allegation, which has been given in. That allegation states, *first*, that Lady Bath died on the 14th July, 1808, leaving behind her Sir James Pulteney, her lawful

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husband, but no issue. *Secondly*, That articles of agreement were entered into in contemplation of a marriage between Lady Bath and Sir James Pulteney, whereby all the real and personal estates belonging to Lady Bath, except as therein mentioned, were agreed to be conveyed, assigned, surrendered, and transferred, to certain trustees who should make such grants, assignments, and so on, as Lady Bath should from time to time after the solemnization of the marriage direct by deed or will, executed by her, and attested by three or more witnesses. *Thirdly*, That while these articles were in preparation, and before the execution of them, Lady Bath gave verbal directions to John Kipling, Esq. of the six clerk's office, who acted as her legal adviser, to prepare a new will for her. It appears that she had executed one previous to the marriage: but she gave directions for another which she intended to execute soon after the solemnization of the intended marriage. That pursuant to these directions Mr. Kipling did prepare an instrument in the nature of heads or instructions for a will which was delivered to Lady Bath a short time before the marriage, the marriage taking place upon the 24th of July, 1794. *Fourthly*, That Mr. Kipling afterwards attended Lady Bath several times to adjust the instructions; and after the same had been adjusted, they were fair copied by order of Mr. Kipling, it being thought expedient that they should be executed by Lady Bath, in consequence of her being on the eve of departure for Scotland, to remain for some months immediately after her marriage, and before a will or testamen —



tary appointment could conveniently be extended in legal form, pursuant to such instructions. That upon the last sheet of the fair copy Mr. Kipling caused a memorandum to be written in the words following: "The above instructions contained in this and the preceding sheets have been given by me to John Kipling, Esq., in order to enable him to prepare my will or testamentary appointment in nature of a will: but as it cannot conveniently be prepared and executed before my leaving London, I do therefore publish and declare this paper writing, contained in six sheets, as and for my last will and testament, or testamentary appointment, in the nature of a will, pursuant to and in execution of a power reserved to me by my marriage articles, and of all other powers in me vested, or enabling me in that behalf, and direct that it shall have the same force and effect as if a will had been executed pursuant to these instructions."

The articles go on to plead "that soon afterwards these instructions so prepared were delivered to Lady Bath. *Fifthly*, That Lady Bath kept the instructions under consideration for several days, and in her own hand made several alterations therein. That on her way to Scotland she paid a visit at Stokesley, in the County of York, the residence of Mrs. Elizabeth Evelyn Fawcett, then Markham; and while there on or about the 3d day of August, 1794, signed, sealed, published and declared, the said instructions as her last will and testament, or testamentary appointment, and the execution was attested by three witnesses." [So that this instru-

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ment is attested in the manner required by the power. If there were any defect in that respect, of course it would be fatal: but it was executed according to the power.]

The *sixth* article refers to these instructions.

The *seventh* then goes on to plead "that Lady Bath, after having executed the said instructions for her will, transmitted the same to Mr. Kipling, accompanied by a letter, as follows:—

*Stokesley, 4th August, 1794.*

"Sir,

I send you by this day's mail coach the instructions for my will.—I have been very unwell, which has prevented my returning them sooner. I hope you will receive them before you have sent off the will itself, as you will perceive I have made a very material alteration in the last folio, which of course must be made also in the will.

I am, Sir,

Your obedient humble servant,

Pulteney Bath.

*P.S.* I beg you to direct your answer to Edinburgh."

The article goes on to allege "that the two lines 27 and 28, from the top of the sixth sheet, were obliterated and struck through in the manner they now appear prior to the execution of the instrument," [that being the alteration alluded to in the letter, which was only interposing certain persons between Mrs. Markham's issue, and her brothers and sisters, and therefore not material to the

present consideration, except for the purpose of shewing that the testatrix had paid particular attention to her disposition of this residue.] *Eighthly*, That Mr. Kipling having received directions from Lady Bath to cause these instructions for her will to be extended in proper legal form, and being himself much engaged by other business, applied to the late Mr. Holiday, a conveyancer of eminence, in order to recommend him some proper person to frame a will for Lady Bath, in conformity to the instructions which had been so executed; and he accordingly recommended his draftsman, Mr. Christopher Wightman, to whom some time in the month of August, 1794, Mr. Kipling delivered the instructions in order to prepare a will in strict conformity thereto. *Ninthly*, That Mr. Wightman did prepare a draft, and delivered it to Mr. Kipling for his perusal. That the draft was inspected by Mr. Kipling; but the difference between the draft and the instructions escaped his observation; and he caused two fair copies thereof to be made for execution which were delivered or transmitted to Lady Bath.

[The draft of the will is brought before the Court, and it appears to have undergone a very careful revision; there are alterations in various parts, and particularly in this, which I should apprehend to be in the handwriting of Mr. Kipling himself.]

The *tenth* article is important. "That after the two fair copies of the draft of the will had been received by Lady Bath, she directed an alteration to be made by extending the bequest of the residue of her personal estate for the benefit

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of Mrs. Fawcett, then Markham, and her issue, to take effect as well in the event of there being only one daughter, and no other child of her, the testatrix, as in the event expressed in the instructions of there being one only son; and further to bequeath the said residuary personal estate in default of issue of the said Elizabeth Evelyn Fawcett, then Markham, to an only child of her the said testatrix, whether son or daughter, in preference to the brothers and sisters of the said Elizabeth Evelyn Fawcett; but did not discover the omission and difference between the said fair copies, and her original instructions so executed by her. That the alterations so directed by the testatrix were accordingly made in the residuary bequest, by Mr. Wightman, or his clerk, which rendered it necessary to take away some sheets of the two fair copies and to substitute others.

*Eleventhly*, That after the fair copies had been altered, they were executed by Lady Bath, on the 5th of November, 1794, and attested by three witnesses.

*Twelfthly*, That the parts were sealed up in envelopes, one delivered to Mr. Kipling, and the other to Lady Bath."

Here are then fresh instructions given by the deceased herself, founded upon a consideration and an accurate observation of this draft of the will itself, and especially referring to the disposal of the residue. It is said that the fresh instructions were given as well in the event of there being only one daughter, and no other child of her the testatrix, as in the event expressed in the said instructions of

there being only one son. Now I see nothing in these instructions as to the event of there being only one son. Nothing of the sort is here introduced, and therefore there must have been some previous instructions given in some way or other as to this event, for it does not form a part of these instructions ; and if the Court pronounces for these instructions in conjunction with the other, it pronounces for them without those intervening instructions, which may have very materially varied the former instructions.

The *thirteenth* article refers to the will in the registry of this Court on which probate was taken, being the part which remained in the custody of Lady Bath.

The *fourteenth* pleads, “ that when Lady Bath executed the will, she apprehended it was in conformity to her instructions, except as she had directed the residuary clause to be altered, and that neither Mr. Kipling nor Mr. Wightman had ever received any instructions whatsoever, different from or other than the executed instructions :” [but of that I must observe, the Court can only be furnished with the parol evidence of these persons, speaking to what passed fifteen years before they can be examined. Yet it is quite clear that there were some intermediate instructions.]

The *fifteenth* pleads “ that no omission in the will, or difference between the will and the instructions from which it was drawn (other than the alterations specified in the *tenth* article), was discovered during the lifetime of Lady Bath : but since her death it has been found that the clause

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inserted in the said will for disposing of the residue of her personal estate, in the event which has happened of her dying without leaving any issue, differs from, and is not coextensive with, the clause in the instructions applying to the said residuary bequest in the same event, inasmuch as by the will Lady Bath, after the death of her father and her husband, and of the survivor of them, directed her trustees thereinbefore mentioned to apply the residue and interest for the separate use of Mrs. Fawcett, and for the use and benefit of her issue, in the case only of the testatrix having one child living at the time of her own decease: whereas by the instructions she ordered and intended her trustees, after the death of her father and husband, to apply the interest of her residue to the separate use of the said Mrs. Fawcett for life, and after her death, to her children and grandchildren, as she, the said Mrs. Fawcett should appoint, in the case of the default of younger children of the testatrix; meaning thereby, whether such default of younger children arose from a total failure of issue of the said testatrix, or by her leaving an only child:” [now to this part, pleading her intention and meaning, parol evidence alone can be introduced,]—“That such difference arose solely through the inadvertency of Mr. Wightman, the draftsman employed to prepare the same, and from Mr. Kipling having relied too much on the accuracy of such draftsman, and not having taken sufficient time to peruse and consider the said draft, as compared with the said heads or instructions.”

“The *sixteenth* article pleads, that on the 22d

of August, 1808, probate of the will and codicil, but without the instructions, was granted to Sir Thomas Jones, and Christopher Codrington, Esq., two of the executors named, a power being reserved of making the like grant to Mr. Kipling. The *seventeenth*, That the will and instructions are now propounded as containing together the true last will and testament of Lady Bath. The *eighteenth*, That Lady Bath had through life the most unbounded affection for Mrs. Fawcett, formerly Markham, who was her cousin; that her attachment continued equally strong after Mrs. Fawcett's marriage with her present husband, as it had been while she was the wife of the Reverend George Markham; and such her affection and friendship continued till the day of the death of Lady Bath, who frequently spoke of Mrs. Fawcett and other children as being the principal objects of her testamentary bounty."

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This is the substance of the allegation which is offered to the Court; and the application certainly does seem, in its first complexion, to be one of rather an alarming sort. Here is a will regularly executed in the most formal way, in duplicate, by a person in good health and of perfect capacity, proceeding with great deliberation, paying great attention to the instrument itself, eleven years afterwards executing a codicil, and not dying till fourteen years after the will is made;—yet, upon an alleged variation between the instructions and the executed instrument, and upon an averment, which is to be supported by parol evidence alone taken

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fifteen years after the transaction, suggesting that such variation was not made by any directions received from the deceased, nor with her privity or knowledge, but through mere error and oversight of the drawer, and of the confidential solicitor, and of the testatrix herself,—is the Court to be called upon to pronounce for the instructions as a part of the will. This, I say, is alarming, because certainly it would be dangerous to open a door to parol evidence in order to establish such a case. If, however, the law does warrant and enjoin it, the Court has only to obey.

Many authorities have been referred to by the counsel on both sides, and many cases have been quoted; and the present question, being one of very great magnitude in respect of property, has been very elaborately argued. It may not be necessary for the Court to restate many of those cases. It will be sufficient to extract the leading principles applying to this consideration.

I apprehend it is a general leading principle, that, when an instrument has been executed by a competent person, you must presume that the person so executing it knew the contents, and the effect of the instrument; and that he intended to give that effect to it. In order to decide, in general cases, what is the effect and construction of an instrument, you can only look to the contents of the instrument itself. If the contents be doubtful, you may receive extrinsic evidence for the purpose of explaining and construing an instrument; but I shall not now enter into the distinction between *ambiguitas latens* and *ambiguitas patens*. But if

a will speaks clear of all doubt, no parol evidence can be admitted to construe it.

Another principle equally clear, and which may be comprehended partly in the former, is that a person by executing a will supersedes the instructions and the draft of that will. The will itself so declares; it states itself to be the *last* will and testament; and the testatrix has stated that she revokes all other wills; therefore, *prima facie* where any difference exists between the instructions or draft and the executed will, you must adhere to the last instrument, the will; and it must be presumed, that the deceased has either expressly directed, or at least adopted and allowed, such alteration.

The Courts have only deviated from those presumptions where some ambiguity arises upon the executed instrument. There exists no very material distinction *in principle* between the Court of probate and Courts of construction, so far as respects the present point.

In the case of *Matthews v. Warner*, this Court, did in the first instance refuse to admit extrinsic evidence; and in that it was confirmed by the Court of Delegates, both Courts holding, that upon the face of the testamentary paper the instrument was perfect and complete; that there was no ambiguity; and therefore evidence that the testator did not intend it to be his will could not be received. But the instrument in that case, though signed by the testator declaring it to be his will, was described at the head of it as "a plan of a will;" and was also indorsed *Plan of a Will*:—it was also writ-

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ten on a piece of office paper, which was ruled over with red lines ; and the Court of review, being of opinion that it was a case in which there was an ambiguity, namely, whether the instrument had been executed by the deceased as a will, or merely authenticated as instructions from which a will should be prepared, did admit extrinsic evidence ; and the decision of the courts below was reversed, it appearing by such evidence that the deceased had no idea several years afterwards that it would operate as his will.

In the case of *Lord Cholmondeley v. Lord Walpole*, the codicil expressly referred to a will by date. The deceased had executed a subsequent will, and doubt was suggested to which of the two wills the testator meant to refer : but the Court of King's Bench was of opinion that there was no ambiguity, and rejected parol evidence.

In the case of *Lord St. Helens v. the Marchioness of Exeter*, the codicil referred to a will none existing ; therefore there was an ambiguity, and parol evidence was admitted in that case.

I must here observe, that in the Court of probate there must be some ambiguity not upon the construction but upon the factum of the instrument,—not whether a particular clause will have a particular effect, but whether the deceased meant that particular clause to be part of the instrument;—whether the codicil was meant to republish a former or a subsequent will;—whether the residuary clause was fraudulently introduced without the knowledge of the testator, (for fraud of course would go to the foundation of the will;)—whether the residuary clause

was accidentally omitted as in the case of *Janssen v. Damer*;—whether an instrument be subscribed in order to authenticate it as memoranda for a future will, or to execute it as a final will, as in *Mathews v. Warner*; these are all questions of ambiguity upon the factum of the instrument. But where an instrument has been subscribed by a person of full testamentary capacity, the instrument carefully read over by that person, and repeatedly considered, and where no ambiguity whatever appears upon the face of the instrument, it must be considered whether in any case of that description the Court has admitted parol evidence; and if it have, whether it was not under circumstances establishing the error clear of all doubt.

In this case it is not suggested that there is any ambiguity in the executed will; and what the exact clause is which has been omitted has not, I think, been very clearly pointed out to the Court: but it is proposed that almost the whole of the residuary clause, as it stands in the instructions, should be taken as a part of the will. The residuary clause in the will is to this effect:—After the death of the deceased's father and husband, the testatrix gives the residue of her fortune to her daughters and younger sons; and if there shall be an eldest or only son, and but one such daughter or younger son, then she gives the whole to that daughter or younger son. The time of payment is then provided for,—the period of vested interest is provided for,—the maintenance and education of younger children are all provided for; and she goes on then to state what shall be done if she has but one child, and this is the stringent part

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of the residuary clause. "In case she shall have but one child living at the time of her decease, be the same a son or a daughter, or in case she shall have two or more sons and no daughter or daughters living at the time of her decease, and all of them but one shall depart this life under the age of twenty-one years ; or in case she shall have two or more daughters, and no son or sons living at the time of her decease, and all of them but one shall depart this life under the age of twenty-one years, and without having been married ; or in case she shall have both sons and daughters, and all but one being a son shall die under twenty-one years, or being a daughter shall die under that age and unmarried, then she leaves the residue to Mrs. Markham and her children ; and if Mrs. Markham has no issue, or her issue die before their having acquired a vested interest, then the property is left to the testatrix's only son or her only daughter : but if they shall have died, and Mrs. Markham also shall have died without any issue, then it is bequeathed over to the brothers or sisters of Mrs. Markham and their executors."

Now upon the executed instrument itself it is not contended that there is any ambiguity in respect of its effect. If there be any ambiguity upon the executed instrument, the Court of construction is the proper tribunal to decide upon that ambiguity, and to admit or reject parol evidence for the purpose of explaining it : for that Court has quite as extensive powers as this Court to receive evidence to explain whatever is ambiguous upon the face of the will itself.—But it has been contend-

ed, and so the case is put, that an ambiguity is raised by looking at and comparing the instructions given for this will with the will itself: and the instructions which are referred to are in these terms,—After giving it to her father and her husband, then after the death of the husband, “then to assign and transfer the principal and all accumulation of interest among her younger children equally to sons at twenty-one, and to daughters at twenty-one or marriage; and in default of such issue, that is, in default of younger children or daughters, to apply the interest to the separate use of the said Elizabeth Evelyn Markham, for her life, and after her death, to her children: and in default of such issue to the surviving brothers and sisters of Mrs. Markham;” between which clauses there is a subsequent interposition of the only son of the deceased. Now the ambiguity, if any, is an ambiguity in these instructions; there might be some doubt whether they are not precisely the same. It has been contended by the counsel, who oppose this allegation, that they are precisely the same; and the Court must presume that Mr. Wightman in drawing the will from these instructions, and Mr. Kipling in perusing this will as drawn from these instructions, and the deceased in perusing and executing the will as prepared from these instructions, did understand them to be precisely the same. I, however, incline to think there is a variation between them, because the instructions would seem, upon the more literal interpretation of them, to convey the

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residue to Mrs Fawcett, in case there were no children at all, for it is given to her provided there are no younger children ; and if there are no children at all, there are no younger children: whereas in the will it is given in the event of there being one son, and her dying and leaving one son, and so on: but if there is an ambiguity at all, it is in the instructions, for they have been obliged to plead in the tenth article, that thereby she meant and intended to give this residue to Mrs. Fawcett and her family, in the event of there being no younger children, whether that arose from there being no children at all, or from her leaving only one child.

But the matter does not rest here ; for it is pleaded in the tenth article that “ after giving these instructions, and the instrument being prepared, the drafts were sent to Lady Bath, and she directed an alteration by extending the bequest of the residue of her personal estate to or for the benefit of the said Elizabeth Evelyn Fawcett and her issue, to take effect as well in the event of there being only one daughter and no other child of her the testatrix, as in the event expressed in the said instructions of there being one only son ; and further to bequeath the said residuary personal estate, in default of issue of the said Elizabeth Evelyn Fawcett, to an only child of her the said testatrix, whether son or daughter, in preference to the brothers and sisters of the said Elizabeth Evelyn Fawcett.” Why then it is quite clear from this account that supposing there was

any difference in the residuary clause between the will and the executed instructions, yet that after the residuary clause had been prepared, the matter had been reviewed and reconsidered by her, and those very directions for the preparation of the residuary clause had been extended, and changed and altered by her ; that subsequently to the bequest of the residue in default of Mrs. Fawcett's issue to her brothers and sisters, she had substituted an only son of her own ; and had gone further, and introduced an only daughter of her own, provided she left no other child ; and that then she went on to provide for the case of her dying without issue, and Mrs Markham dying without issue ; so that the whole of this was revised and reconsidered, and new-moulded by her after the draft of this will had been submitted to her consideration.

Now various conjectures may be formed in respect to the subject : perhaps the probability is that it was a matter of oversight by the testatrix herself, and Mr. Wightman, and Mr. Kipling. But can the Court in a case of this description decide upon probability and conjecture as to what was the intention of the testatrix, when it appears most clearly that she had the whole matter submitted to her own consideration, and gave these additional instructions ? If there was any variation, what is the Court to presume ? The Court can only *safely* presume, and can only safely allow it to be asserted, that this variation was a variation adopted by the deceased, or directed by her, or at least approved by her ; it could not *safely* permit it

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to be asserted that the whole of this was contrary to the intentions of the deceased, and was all a complete oversight on her part unless on circumstances amounting to the most clear demonstration that such were not the real intentions of the deceased—and that it happened either by some fraud practised upon her, or by some manifest omission on the part of the persons with whom she advised.

Among the cases which have been quoted, that which appears to come nearest the present case is certainly that of *Damer v. Janssen*; for the other cases have been very satisfactorily distinguished from the present by the learned gentlemen whom I have just heard. In the case of *Bridge v. Arnold*, where a part was expunged, that appears to have been on the ground of insanity, or the want of satisfactory proof of instructions given by a testator having capacity. *Barton v. Robins* was a case of fraud.—The case of *Micklem v. Franklin* was upon the constructive revival of a former will. The other case I would also shortly notice is *Gerrard v. Gerrard*—there the will had an ambiguity upon the face of it:—the words of the will were, “I appoint *her* executrix and residuary legatee.” No name appeared to which the pronoun “*her*” referred: but, by admitting the instructions and receiving parol evidence, it was clear, the words, “my dear wife,” had been omitted in writing over the will, and therefore parol evidence was admitted to explain the ambiguity in the will itself. But the case of *Damer v. Janssen* is principally relied upon to lay a ground for the admission of the

present allegation ; and it is for the Court to consider whether it goes the whole length—and that cannot be considered without stating that case pretty much at large.

[*The Judge then stated circumstantially the allegation in the case of Damer v. Janssen.*]

This is the case of *Damer v. Janssen*, in which the parties were allowed to go into proof by this Court, and the superior Court, the Court of Delegates. In that case there was shewn a clear manifest omission of one entire important clause, and in respect to the construction of which there was not the slightest ambiguity whatever. Even upon the face of the instrument there did appear something of an ambiguity with respect to the contents, for there was a total omission of any disposal of the residue—and a total omission of a provision for one of the deceased's daughters. It should seem, therefore, from the paper itself, that something had been omitted : but still more was there an appearance of an omission when the paper was compared with the former executed will; because in the former executed will there was a residuary clause, and that residuary clause was in favour of this omitted daughter :—again, the omission yet more strongly appeared, by comparing the will with the instructions for the will, which were found in the escritoire of the deceased, inasmuch as there was in those instructions this residuary clause in favour of the youngest daughter ; and it was not ticked off in the same manner as the other legacies were, when the draft was copied : therefore, taking those papers together, there was

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a strong appearance of some omission, as well as some ambiguity, upon the face of the will itself.

In the next place the proof did not depend upon mere parol, but primarily on a paper, namely, the instructions, written by the deceased himself. There was no doubt what he intended by that paper: but the intention of the deceased in respect of the disposition was further supported by circumstances establishing the facts beyond all possibility of doubt, namely, that the eldest daughter had been provided for; that there was a former will leaving the residue to the youngest daughter; that there were instructions to the same purport, these instructions containing the residuary clause, but not in the usual place; that all the legacies were ticked off, but the residue was not. There was also a probability, from the deceased being in haste and ill health, and the paper being *merely* sent to him, when trusting to what was done by his confidential solicitor, the omission might have escaped his notice; the declarations of Mr. Robson, the solicitor, *recenti facto* to his partner Mr. Scrase, and the declarations of the deceased himself at Bath to Mr. Scrase confirmed the whole, and presented such a body of evidence, that the Court might perhaps *safely* under the circumstances of that case admit the extrinsic evidence.

There is also another important distinction, that between the giving of the instructions to Mr. Robson and the execution of the will by the deceased, there were not any intermediate instructions whatever given by him by which he could have directed this omission of the residuary

clause. And yet, as I have always understood, notwithstanding all these circumstances, there was considerable hesitation entertained in the first instance, as to the decision upon the point, and whether the Court could admit evidence of such an averment against the execution of the formal instrument; the presumption of law being so strong, as has been already stated, that where a person in full possession of capacity solemnly and formally executes an instrument, he must be presumed, and must be taken, to know the contents and effect of that instrument. The Court in that case did admit evidence. It is the only case which has happened in this Court with which I am acquainted, that at all approaches the present; and the Court is to consider whether it comes up to it.

Now in the case I am here called upon to consider, the very instructions which are attempted to be introduced are in themselves in some degree ambiguous. The instrument which is executed does not appear to be ambiguous. And what the Court also relies upon as distinguishing the one case from the other is, that between the giving of these instructions and the execution of the will here are fresh instructions given, and here is a draft of the will submitted repeatedly to the deceased, and the deceased's attention is very fully drawn to this part of the will. She considers it and reconsiders it, and directs respecting it over and over and over again; nay, at the very time of the execution of the will, here is in the residuary clause itself an interlineation made in respect of the contingencies upon which Mrs. Faw-

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cett was to take the residue; that interlineation is made both in the will and the duplicate by Mr. Kipling himself; and is noticed by the deceased herself, for the deceased herself applies her initials to it.

How then is it possible that the Court can, with any degree of safety admit parol evidence, to shew that this variation which had taken place between the instructions and the will, supposing any variation to exist (for I am taking the argument in that shape) was not directed by the deceased, or if she did not direct it, that she did not understand and approve it; yet all this is to be established by the recollection of Mr. Kipling to be examined 15 years afterwards. Supposing that the precedent of *Damer v. Janssen* did lay a foundation for the Court to admit proof for the purpose of supplying a clear omission by oversight; yet the circumstances by which that omission was to be established, are so very different in their nature and quality from the present, that it does not form a sufficient precedent. Even that case was considered to have gone to the utmost length to which the Court could go, with any degree of security; and this Court cannot presume to extend it: if it is to be extended, that must be left to the greater authority and wisdom of a superior tribunal. It is much safer for this Court, consisting of a single individual, and acting with all due humility and diffidence, to adhere to the plain broad landmarks of the law: it rarely happens that a general rule of law is broken in upon for the relief of a particular case, that that breach of

the general rule is not found to be afterwards attended with infinite mischief. Here is a will most carefully prepared, most formally executed, not only by a capable, but by a very attentive testatrix ; her attention specially directed to this clause, over and over again ; and the Court must presume, I think, that the effect which this clause will have, was that effect which the deceased intended it should have,—or at least, that proof to the contrary cannot safely be admitted ; I cannot find a sufficient precedent for the admission of parol evidence, under such circumstances ; and I think its admission would introduce a most alarming insecurity in the testamentary disposition of all personal property. Upon these grounds, and sincerely hoping that this case may be submitted to the decision of a superior tribunal, (which probably it will from its great importance,) I shall in the first instance think it my duty to reject the allegation.

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(*An Appeal from the Prerogative Court of Canterbury.*)

JUDGES' DELEGATES.—Mr. *Justice Lawrence*, Mr. *Justice Le Blanc*, Mr. *Baron Wood*, Dr. *Arnold*, Dr. *Ogilvie*, Dr. *Edwards*, and Dr. *Dodson*.

BEFORE the Court proceeded to hear the argument in the grievance, the three following articles were tendered as additional to the allegation rejected by the Court below.

First, Whereas, in the *tenth* article of the allegation given in behalf of the said Elizabeth Evelyn Fawcett (formerly Markham) is alleged and pleaded, "That after the two fair copies of the draft of the will had been received by the Lady Bath, she directed an allegation to be made, by extending the bequest of the residue of her personal estate to and for the benefit of the said Elizabeth Evelyn Fawcett, and her issue, to take effect, as well in the event of there being one only daughter, and no other child of the said testatrix, as in the event expressed in the instructions of there being only one son:" and further, "to

bequeath the said residuary personal estate, in default of issue of the said Elizabeth Evelyn Fawcett, to an only child of her, the said testatrix, whether son or daughter, in preference to the brothers and sisters of the said Elizabeth Fawcett. Now the party proponent doth allege that the same was pleaded through error and misinformation, at the time for two fair copies of the draft of the will had been made for execution (as pleaded in the *ninth* article), the same were forwarded by John Kipling, or by his clerk, to Lady Bath, at the Countess of Ancram's at Lebattle Abbey, near Edinburgh, where she was expected to be, but she had in fact quitted that place before the packet containing the two copies of the will arrived; and such packet remained with Lady Ancram unopened, until sent for by the deceased.

Secondly, That on the 20th Sept. 1794., John Kipling being at Overstone, in Northamptonshire, received a letter from Lady Bath, dated from Wansford, 20th Sept., 1794, requesting him to meet her at Northampton, on the evening of that day on business. That John Kipling accordingly went to Northampton, on the evening of the 20th Sept.; at which time, or on the next morning, Lady Bath gave him verbal instructions and directions to make an alteration in her will, being one of the alterations pleaded and set forth in the *tenth* article; and he then wrote, in pencil, a memorandum in his pocket-book in the words following, *viz.* " Will to be altered eldest son and her brothers and sister; and the party alleges that the deceased had not, at that time, nor did she ever see, the draft of

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her will, and she had not then received the fair copies of the draft forwarded to her for execution. That she directed John Kipling, at this interview, to write to the Countess of Ancram to send him the parcel in which the said copies were enclosed; and the parcel was accordingly returned by Lady Ancram, and received by John Kipling, or his clerk, on the 2d of October following, without having been previously opened; and on the 8th of the same month the said fair copies of the will were, by the direction of John Kipling, delivered to Thomas Bainbridge, then a clerk of John Kipling's, to Christopher Wightman, in order that the alteration so directed by the deceased might be made therein. That such alteration was accordingly made by Christopher Wightman, or his clerk, in the manner pleaded in the *tenth* article of the allegation; and thereupon, in the copying such altered part of the said will, and several of the sheets in each fair copy of the will were on the 13th of Oct. taken therefrom, and four other sheets containing the said alteration were written and substituted in their stead.

Thirdly, That on the 13th Oct. John Kipling being at Overstine, sent a letter to the deceased, who was then in London, or soon expected to be, on her way to the continent, wherein, referring to the very alteration pleaded in this and the preceding article, he expressed himself in the words following: "The will and duplicate having been returned by Lady Ancram, the alteration which your Ladyship suggested placing an only child of yours, being a son, after the bequest of

the residue to Mrs. Markham and her children, but before Mrs. Markham's brothers and sisters, has been made; and the will and duplicate may be executed whenever it is agreeable to your Ladyship, in the presence of Mr. Bainbridge and two other witnesses. That the two copies of the will altered in manner as pleaded in the preceding article were sent by Mr. Bainbridge to the deceased shortly after the 13th of Oct.; and she, the deceased, had never before seen any copy or draft of the will. That the deceased soon afterwards gave further directions to Mr. Bainbridge, for a further alteration in her will, by making the bequest of the residue of her personal property to Elizabeth E. Fawcett and her issue, to take effect, as well in the event of there being one only daughter, and no other child of her, the said Lady Bath, as in the event of there being one only son, being the other part of the alteration pleaded in the *tenth* article; and the deceased expressed himself desirous that the alteration should be made in great haste, as she was about to depart for the continent; and thereupon the draft of the will was immediately re-delivered by Mr. Bainbridge to Christopher Wightman; and the last mentioned alteration was accordingly made therein in the handwriting of Christopher Wightman, or of his clerk; and in consequence thereof several of the sheets in each fair copy were on the 27th October taken therefrom, and six new sheets containing the last mentioned alterations were written and substituted in lieu thereof; and the fair copies of the will, after being so altered, were on the 27th

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Term.

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and
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November delivered by Mr. Bainbridge to the deceased.

Dr. Swabey in support of the additional articles.

Although generally, in an appeal from a grievance, the case is to be heard *ex iisdem actis*, yet this rule is subject to exceptions; and there is no difference whether fresh matter is introduced on the application of the party, or *ex officio*.

There was a case lately in the articles, *Watson v. Faremouth*, an appeal from the Consistory Court of Exeter, for nullity of marriage by reason of affinity. The citation which was taken out, and the libel which was admitted in the Court below, stated no interest in the party prosecuting the suit. The Judge in the Arches' Court, finding upon enquiry that the parties had an interest, gave them leave to plead that interest in the superior Court.

Under the authority of that case we are not precluded from adding those articles to the allegation.

Every Court has three modes of dealing with a plea:—First, to admit it *modo et forma*,—Secondly, to reject it,—Thirdly, to reform it, or send it back to be reformed.

Sir Arthor Pigott, contra.

It is necessary, before we proceed, to understand whether the additional articles can be opened. It is an appeal from a sentence below, and there is obvious danger in admitting this amendment to the allegation which was there debated. The case cited is especially different from this; it was necessary that the party proceeding should have an interest. The ascertaining, therefore, whether there was

an interest or not would go to the merits of the case, and be a preliminary step to the discussion of it.

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and

CODRINGTON

and

PULTENEY.

July 7.

The Court decided to hear only on what was done by the Court below.

Sir Arthur Pigott, Mr. Leach, Dr. Burnaby, and Dr. Daubeny, (counsel for the executors) and Sir Samuel Romilly, Dr. Stoddart, and Dr. Jenner, (counsel for Sir James Pulteney) argued in support of the sentence of the Court below.

Mr. Richards, Dr. Swabey, Dr. Adams, and July 9. Mr. Heald, (counsel for Mrs. Fawcett,) contra.

Sir Arthur Pigott, and Dr. Burnaby, were July 16. heard in reply.

The Court affirmed the sentence of the Court below.

CONSISTORY COURT OF LONDON.

*Trinity
Term,
May 16.*

PATRICK v. PATRICK.

The absence
of consum-
mation of the
marriage no
bar to a di-
vorce.

THIS was a suit brought by the husband against his wife for adultery. The adultery was fully proved : but the evidence did not prove consummation of the marriage. The general result of it seemed to be that the woman would not allow consummation, and immediately eloped with the adulterer.

Burnaby for the wife,

Mentioned this circumstance : but did not feel that it authorized him to press it in objection to a sentence of divorce.

The Court pronounced for the divorce without hearing the counsel in support of it.

N.B. The words usually introduced into the sentence declaring the consummation to have been proved were omitted in this sentence.

PREROGATIVE COURT OF CANTERBURY.

In the Goods of **LAURENCE CRUMP**, deceased.

LAURENCE CRUMP died in March, 1801, having made a will, and appointed three executors, —his brother Thomas Crump, (who died in his lifetime,) and John Page, and John Wilmot, who survived him.

The testator by his will bequeathed the residue of his estate and effects to his said executors, in trust to invest the same in their joint names, in the purchase of government securities—to apply the interest and dividends, not exceeding 150*l. per annum*, to the maintenance and education of his daughter, Ann Crump, (then a minor) till she either married or attained her majority ; and to invest the surplus, in the interim, in the purchase of the like government securities, to accumulate with, and become part, of the residue. Upon Ann Crump's marrying or attaining her majority, the executors were directed to pay the whole interest of the residuary estate, with the accumulations, to her for her sole and separate use during her life, and the

principal at her death to her appointees by deed or will.

In March, 1801, probate was taken by the two surviving executors, who proceeded thereupon to execute the trusts of the will; and, upon Ann Crump's attaining her majority, commenced paying her the whole interest of the residuary property. Ann Crump subsequently married John Bott: but continued to receive the interest and dividends annually, from the various government securities that constituted the residue of Mr. Laurence Crump's estate, up to October 1817.

In November 1817, Mr. Page died, leaving his co-executor Mr. Wilmot still surviving. Mr. Wilmot's state of mind and body had been such from paralytic affection as to render him incapable either of receiving the interest or dividends himself, or of executing the necessary legal instruments to enable any other person to receive them for him. Mrs. Bott had consequently been precluded from receiving any portion of the interest or dividends on the residuary property for more than three years, there being no sufficient legal representative of Mr. Laurence Crump's estate, by reason of Mr. Wilmot's continued incapacity, who could receive and pay her such interest or dividends.

J. Addams, upon due proof, by affidavit, of the special circumstances proved, applied to the Court to decree administration (with the will annexed) of the goods and chattels of the deceased (limited so far as concerned the right and title of Mrs. Bott to the interest and dividends which had then arisen and become due, or which should thereafter arise

and become due, on the several sums invested in different government securities that constituted the residue of the deceased's estate) to Mrs. Bott, for the use and benefit of Mr. Wilmot, the surviving executor and residuary legatee in trust, during his life and incapacity.

Per Curiam.

Administration with the will annexed is prayed on the part of the residuary legatee, and not opposed by the next of kin to enable him to receive the dividends, during the life and incapacity of Mr. Wilmot, the only surviving executor. No inconvenience can result from the grant. Mrs. Bott has alone a beneficial interest in the property; it will be merely a power to receive the dividends to which she is entitled;—if the authority is not granted, the party has no remedy. The only difficulty is, that the application is rather a novel one. In this case the executor has no beneficial interest; and it is not to be expected that a committee will be appointed by his family merely to benefit this party.

Upon the whole, I think, I may grant administration with the will annexed as prayed: this is not revoking a former grant supplemental to it; and to carry into effect the real object of the testator's will.

CONSISTORY COURT OF LONDON.

1821.
Hilary
Term.
Feb. 12.

ARKLEY v. ARKLEY.

Cruelty is not a bar to a charge of adultery,—but may be pleaded as introductory to the history of an adulterous intercourse.

THIS was a suit brought by a husband against his wife for a divorce by reason of her adultery. An allegation was now offered on the part of the wife, in which cruelty and adultery were pleaded on the part of the husband.

Swabey and Lushington.

It is not competent to the party in this case to plead cruelty; if established, it would be no bar to the suit.

Jenner contrà.

It is not offered in bar to the rest, but as introductory to the further history of the case.

JUDGMENT.

SIR WILLIAM SCOTT.

The allegation pleads, that after Charlotte Goodwin came to live in their service, the husband began to quarrel with his wife, and so conducted himself towards her as to endanger her life; and that during the confinement of the wife the adulterous intercourse with Charlotte Goodwin commenced.

This is pleaded as introductory to the history, and is not liable to the objection taken: it shews that the affections of the husband were alienated by the introduction of this woman into the family.—Cruelty is certainly not a bar to adultery: but in this view it is admissible.

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Hilary
Term.
~
ARKLEY
v.
ARKLEY.

The office of the Judge promoted by
LORD VISCOUNT MAYNARD v. BRAND and PHILPOT.

1821.
Hilary
Term.
Feb. 21.
~

THIS suit was promoted by Lord Viscount Maynard, patron of the living of St. Mary Thexted in Essex, and impropiator of the great tithes, against the churchwardens of the parish for refusing to rebuild or repair the spire of their parish-church.

A monition issued against churchwardens to repair and reinstate in its original form the spire of a church which had been destroyed by lightning.

On the 7th of July, 1820, articles were brought in:—they pleaded;—

That from time immemorial there had been and still was a parish and parish-church known by the name of St Mary Thexted, in the county of Essex, within the archdeaconry of Middlesex, and the diocese of London, with a tower at the West End, appendant to or forming a part thereof; and that until the 14th of June, and the 16th of December, 1814, when the same was blown down or destroyed, there was a spire built on and upon the said tower with a vane on the top of the same.

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 PHILPOT.

That the said church tower and spire were all built of free stone in an uniform stile of architecture;—that from the summit of the vane of the said spire to the ground floor of the said tower was a perpendicular height of sixty yards and one foot, the height from the spring of the said spire, from the tower to the top of the vane, forming thirty-three yards one foot of such whole height. That on the 15th of June 1814, the upper part of the said spire, to the extent of about forty feet from the top, was injured by lightning, and the churchwardens and parishioners undertook the repairs thereof, and for that purpose raised a scaffolding; but not being able to complete the same before the winter came on, and by reason of the snow and ice which had accumulated on the said scaffolding, or of other defects which had taken place in the said tower, on the 16th of December in the said year the remainder of the said spire to within twenty-five feet of its junction with the said tower, was blown or fell down upon the roof of the said church and much injured the same, and also the body of the said church. That the parish have repaired the body and roof, but refuse to rebuild the spire, although duly admonished thereunto at the archidiaconal visitation of the said parish, and often entreated and urged by Lord Maynard to do so.

On the 13th of December, 1820, an affirmative issue was given to these articles.

Phillimore and Addams moved the Court to admit the articles, and to monish the Churchwardens to repair and reinstate the spire in its original form.

Swabey contra.

Though the churchwardens have given an affirmative issue, it does not follow that they have confessed all the matters pleaded in the articles. Lord Maynard the patron could have called upon the parties by a civil process, there was no necessity for a criminal proceeding of this description; and there are difficulties in rebuilding the spire which cannot be surmounted.

Phillimore, in reply,

Contended that the affirmative issue which had been given to the articles was conclusive as to the admission of the facts, and a bar to any argument in opposition to the relevancy of them.

Per Curiam.

I shall certainly issue a monition to the churchwardens to repair the spire as prayed. An affirmative issue has been given:—if there are difficulties which cannot be surmounted, reference must be made to the Court: but I have no reason to presume there are any such.—The monition must go to repair and reinstate.—But, for the protection of the churchwardens, they should be informed that they must make their rate before they commence their repairs.

I shall not give costs;—I presume they are not pressed in this case.

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*Hilary
Term.*

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v.
BRAND
and
PHILPOT.

PREROGATIVE COURT OF CANTERBURY.

BAYLE V. MAYNE AND LAMBARD.

1821.
Hilary
Term.
March 13.

Allegation,
pleading an
unfinished
and unexe-
cuted paper,
rejected.

JUDGMENT.

SIR JOHN NICHOLL.

This is a question respecting a paper propounded as the will of Mrs. Grace Otway. The allegation pleads that the deceased died at Seven Oaks,—that her personal property amounted to 4,000*l.*, and that she had the power of appointment of 4,000*l.* more;—that she left three sisters, and three children of a deceased sister; that she wrote the paper propounded with her own hand; that it was deposited in a drawer a few days before her illness, and there found at her death.

The first consideration is, whether it is a perfect or an unfinished paper:—it has hardly been maintained that if it is unfinished, the circumstances are sufficient to sustain it; the question has been made whether the deceased intended to do more to give it effect.

The paper has been written at two different times,—the first part relates to her funeral, and the executors.

In a subsequent part, written with ink of a different colour, a legacy is given in trust for her sister to the two executors.—Here she stops, and nothing more is done.

It is hardly possible to consider, that the deceased intended this to be finished:—the first part is as much finished as the second, for there she stops and afterwards writes more:—it is contrary to all reason and experience to suppose that she did not intend to do more;—it is not signed nor dated,—it disposes only of part of her property; it is torn at the bottom in an uneven manner; it may have been written ten years, for the paper bears the water-mark of 1811. Finally, it is thrown into an open drawer; such an instrument cannot be considered as a finished paper.

It is stated in the third article, that she deposited it in an open drawer a short time before her death: this circumstance is pleaded to shew that she placed it in the drawer after her return to Seven Oaks. In the beginning of November, she was taken ill, confined to her bedroom, and never came down stairs again:—the conclusion from this fact is the same as from the face of the paper; she puts it in a drawer either with pieces of tape or with filberts, and in a drawer to which the servants had access;—she either must have considered it as an abandoned paper, or as the inception of a mere memorandum.

My opinion is most decided that she did not consider this as her will, her whole conduct confirms

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Hilary
Term.

BAYLE
O:
MAYNE
and
LAMBARD.

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v.
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and
LAMBARD.

this :—she was down stairs till the 20th of November; she then took to her bed, and since then there has been no reference to this paper. Nothing in any degree tends to confirm the idea, that she considered this as an instrument to operate after her death.

I have no doubt in rejecting this allegation ;—it is for the benefit of all parties that I should reject it in the first instance.

ARCHES COURT OF CANTERBURY.

CHETTLE v. CHETTLE.

1821.
Easter
Term,
May 19.

*By letters of request from the Commissary Court
of Surrey.*

JUDGMENT.

SIR JOHN NICHOLL.

This is a suit for adultery, brought by a grocer of Grantham against his wife. The marriage is proved to have taken place in 1804. The adultery is charged with a young man of the name of William Marshall, in 1819. A clandestine intercourse is proved for some time;—it is also clearly proved that on one occasion they slept together at an inn, and that they have since cohabited at two places. There is no doubt as to the identity; and I have no hesitation in saying that adultery is sufficiently established, and that the husband is entitled to a sentence, unless the wife can prove something in bar.

In a suit for adultery, solicitation of chastity not proved by the adverse party; and if proved might be doubtful whether it could be considered as a bar to a sentence of divorce.

She has pleaded, first, *condonation*, which has not been relied upon by the counsel; and, secondly, *recrimination*. Many circumstances of cruelty have been alleged: but the Court has been of opinion in many cases that cruelty forms no defence in

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Term.

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v.
CHETTLE.

a cause of adultery ;—but where acts of violence, connected with other circumstances, have been pleaded, the adultery of the husband or wife has been admitted to proof.

It appears that these parties lived unhappily together :—but there is no ground to say that there was either condonation or connivance. There were frequent quarrels and mutual jealousies arising chiefly from the violent temper of the wife. They agreed to separate on the 19th of August. A deed was executed which secured a certain allowance to her, provided she was not living in adultery. There is no ground to say that the husband was at all aware of the adultery at this period. They occasionally lived together afterwards ;—but the adulterous connexion was not then discovered : indeed, it was on questioning her during the last cohabitation, that he made enquiries, and discovered the fact. There is then no condonation ; and if there had been, the subsequent adultery of the wife would have revived his right to proceed against her.

Next, as to the recrimination. The allegation charges adultery with Elizabeth Wake : but there is no proof of adultery with any one, or of improper attention to Elizabeth Wake. It is said there is proof of another description, *viz.* the solicitation of the chastity of different women ; particularly of his servants. I have not heard a case stated in which, there being proof of adultery on the part of the wife, the mere solicitation of chastity by the husband has been considered a bar. But what is the evidence here ? Mere hearsay. Nothing seen. Servants are produced : but, excepting two, none

prove any liberty taken with them. Jane Price says, that while she was in Mr. Chettle's service, he, being evidently intoxicated, put his hand on her shoulder, and attempted to kiss her; she remonstrated, and he apologized. This, although improper, is not a solicitation of chastity.

Mary Wilkinson was examined on the 10th of August, 1820, at which time the wife was living in her house in a state of adultery; which circumstance does not tend to entitle her to full credit:—indeed, I doubt whether the evidence be admissible. She is not vouched to any *fact*, but examined on the general article; and on which the husband had not an opportunity of contradicting her evidence. She says he attempted to kiss her: but she lived in his service two years and a half after. She states, that one evening after he returned from his club, he put his arm round her neck and kissed her, and that he did the same on another occasion; and that he scarcely ever saw her but he attempted to kiss her. He said he would come to her bedroom;—she said she should cry out, and he did not come. To the seventh interrogatory she says,—“he sometimes kissed her, and said she was a pretty girl; but he took no other liberties with her.”

This was very improper; but the solicitation did not proceed beyond this:—and I question whether it is such as could, under any circumstances, bar a husband from a divorce.

Foster v. Foster has been mentioned:—nothing can be more different. There were doubts whether the doctrine held in that case was warranted:—but the Court thought the husband was in great

1821.

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CHETTLE

v.

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*Easter*  
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CHETTL  
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measure the author of his own dishonour. There was gross neglect on the part of the husband, and the solicitations were such as strongly to infer that actual adultery had been committed. The wife had been exemplary in her conduct for ten years ;— she was carried to Lisle, and left there by the husband. During these ten years, he was using all means to seduce, almost to force, the maid-servants. Three denied the adultery ; the fourth refused to answer. Whether that might have been sufficient to have entitled the wife to a sentence of separation on her part, might be doubted : but, under all the circumstances, the Court held the husband barred of his remedy, and I quite agree with the Court. There is nothing similar in this case.

I pronounce for the divorce.

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## PREROGATIVE COURT OF CANTERBURY.

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In the goods of THOMAS ROBINSON, deceased.


1821.  
*Easter*  
*Term.*  
March 13.

**JUDGMENT.**

SIR JOHN NICHOLL.

This is an application on the behalf of Richard Robinson, against Barham, the residuary legatee for life, and administratrix with the will annexed, of Eliza Robinson, whilst living the universal legatee and administratrix of Thomas Robinson, to shew cause why such administration with the will annexed of Thomas Robinson should not be revoked, and the administration granted to him : in other words, the object is to put her on proof of the will.

This application is founded on an affidavit of Richard Robinson, that he was in New South Wales when the administration was granted ; that he did not hear of these proceedings till 1819 ;—that he arrived in England in December of that year ;—was soon afterwards taken ill and unable to make enquiries ;—but that he has since made them, and finds sufficient ground for contesting the



1821.  
Easter  
Term.

validity of the will in question ;—that Eliza Robinson is since dead ;—that her will has been proved ;—and he prays that Mrs. Barham may be called upon again to prove the will of Thomas Robinson.

There is no precedent in point to guide the Court with respect to this application : I must look therefore to general principles.

In the original cause a citation *viis et modis* was served at the Exchequer at Hull, where this person had his last residence before he quitted England ; and at the house he had occupied in that town, and on the pillars of the Royal Exchange at London. The party, therefore, used all due diligence. There is some difference between this service and a personal service :—a personal service may conclude both the party and the Court ; but a service *viis et modis* is a constructive service, and concludes the party, but does not conclude the Court. The Court, on good and sufficient grounds, may open proceedings to get at the substantial justice of the case. What are the grounds which would warrant me in opening the case ? If there had been any fraud or contrivance, or collusion, in taking out the process, of course that would be sufficient, for no person should be allowed to take advantage of his own fraud.

It is admitted that the party was at Botany Bay ;—but he must shew, first, that he was ignorant of the proceedings ; secondly, that he has used due diligence since he became acquainted with them ; and, thirdly, that he has a *primâ facie* case on the merits, and that justice would require the cause to be opened.

Ignorance of the proceedings he has shewn, for he was at Botany Bay when they took place ;—he has shewn that he came to England with due expedition,—but not that he has used due diligence since his return. He says he was prevented by illness ;—the expression, *soon after*, is vague ;—again, an illness for several months is unsatisfactory :—it is not set forth to have been such an illness as prevented him from employing a person to make the necessary enquiries :—the fact, however, is, that no notice was given to the other party till the 15th January, 1821, above a year after his return to this country. What happens in the mean time ? The executrix under the will administers to all the property, and dies. By her will she disposes of this property ; and it has now passed into the hands of third persons, who may be ignorant of all the circumstances relating to the making of this will. I think the complainant is barred by his own wilful negligence ; and the Court would run the risk of committing injustice if it allowed him to proceed : but if there was no negligence of this sort, the Court must look at the original case. It was not a mere *ex parte* proceeding ; the will was opposed by an uncle and two aunts ; the witnesses were cross-examined, and closely ; the proof was not merely formal. The plea was more than a common *condidit* ; it pleaded affection for the party, and declarations in her favour ;—five witnesses were examined ;—the proceedings were *in pœnam* ;—the evidence, therefore, was necessarily considered, and the proof was so clear and conclusive that the adverse parties and their legal advisers did

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Easter  
Term.



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*Easter*  
*Term.*



not employ counsel ;—and they judged not unwisely, for the depositions satisfactorily established the case set up.

Against this, the affidavit states “that he has received information from persons of credit who were not examined” ;—this is utterly insufficient for the Court to act upon ; certainly the Court would always go as far as it has the power, to make the forms of proceeding bend to substantial justice.

Looking at the principles which usually govern this Court, I am satisfied that I ought not to open this cause ;—and I reject the present motion.

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## ARCHES COURT OF CANTERBURY.

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PARHAM *v.* TEMPLAR. (*a*)

1821.  
*Easter*  
*Term,*  
*May 28.*

**J**UDGMENT.

SIR JOHN NICHOLL.

In January, 1775, a faculty was obtained for new pewing the church of Ashburton, according to

(*a*) The following judgment, delivered by Sir W. Wynne in the Court of Arches, on the 22d of February, 1794, in a cause differing in features, but of the same family with the case here reported, affords an excellent specimen of the terseness of style and the soundness of principle which characterized the decisions of that learned Judge.

A proceeding against a curate for altering a seat in the body of the church without competent authority.

Error in the institution of the suit. Judgment of court below reversed.

DRURY *v.* HARRISON.

SIR WILLIAM WYNNE.

This is a suit for perturbation of seat, brought by Thomas Drury, an inhabitant of Allhallows, Bread-street, against Harrison, the churchwarden.

William Drury, the brother of Thomas Drury, came into the parish, carried on trade there, and had the pew in question;—he continued till Christmas 1790, in possession of the house and pew,—for eight or nine years.

Thomas Drury, who had not been an inhabitant before, took

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Term.

PARHAM  
v.  
TEMPLAR.

a plan annexed. A seat was reserved for a person of the name of Tozer ;—no other exclusive right

the house of his brother, and carried on the business ;—he took possession also of the pew, *i. e.* he continued to sit in it, for he sate in it with his brother frequently while he was resident.

At a vestry, in April 1790, (there are not more than two vestries in the year) the pew became the subject of consideration. The witnesses do not agree how the mention of it originated ;—one says that he first spoke to Drury that if he continued the pew, he must pay five guineas ;—another, that Drury mentioned it first. It is plain, that provided he would pay five guineas, no doubt was expressed by the churchwardens or others that he should continue. Whether Drury absolutely refused, or put off the consideration, is not quite clear :—but Smith, the churchwarden, entered into a negociation with Butler, who agreed to pay the five guineas. Soon afterwards, Harrison, (who had just been elected churchwarden,) said neither should have it, but he would have it himself.

It has been argued that this was a vacant pew ;—that Harrison, as churchwarden, had a right to dispose of it,—and to dispose of it to himself.

The question for the Court is, if there be any right in Drury to this pew.

The right is in the churchwardens, both in London and elsewhere, to dispose of pews ;—this is for convenience, and for the preservation of peace and quiet. But this right is not to be exercised arbitrarily ;—not without considering whether there be any legal or equitable right. If the churchwardens interfere to take away a seat, and *a fortiori*, to take it to themselves, the ordinary will interfere, as it would by a suit for perturbation of seat, although it were not originally meant for that purpose.

The strictest right, that of faculty, is usually granted to a family ; there is no such right here, but the seating has been by the churchwardens, for the brother has been so seated.

The first fact is, that Drury was in possession of a house and trade in the same situation as his brother, for ten years, which would be alone a very considerable circumstance.

were maintained. After the church was new seated, the pews were allotted by the churchwardens.

In *Astley and Biddle v. Ripley*, 1774, Astley took a house at Mortlake, occupied it for forty years, and occupied a pew. The churchwardens said it was the custom to pay :—he refused. The churchwarden placed another person with him; he brought a suit for perturbation of seat against the churchwarden. Sir George Hay thought he had made an improper use of his authority, and nonsuited the churchwarden;—and directed that he should not sell the seats.

The only difference between the two cases is, that there was a longer occupation :—but here there has been an occupation of nine or ten years; and it is exactly the same situation, if the brother's occupation be added to it. But it does not rest here, for he was a partner in a house of trade; the parish taxes and rates must have been paid by partnership accounts, and they considered him as a parishioner for the whole time.

In *Brook v. Owen*, 1718, the question was, who was bound to serve the office of churchwarden :—and a partner in trade, lodging in another parish, was held bound to serve in the parish where his house of trade was. Considering himself a parishioner, he came to the churchwardens. A person may be a parishioner without inhabiting a house, if he occupy a farm.

This puts all question who is the more proper person to have the pew, out of the case. The possession of the brother was the possession of himself; and the pew was not considered by the parish as vacant, but as an opportunity to get five guineas.

One of the witnesses says that Townend, the partner, sits there;—he has a right so to do :—that the warehouseman sits there; there is nothing improper in this.

Under all the circumstances, the discretion of the churchwarden has been improperly exercised; it would have been so, if he had placed another there;—it has not a more favourable appearance that he did it for himself.

The person displaced had a right which the churchwardens had no right to disturb, and in which he must be quieted;—and Harrison must pay the costs.

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Each occupant was to pay a certain small sum as a pew-rate, which was to be applied to the repair of the church. Whether this payment was strictly regular need not now be discussed : but it is clear that those who paid the pew-rate could have no exclusive right to the pews, as acquired either by faculty or prescription. At this period Mr. Dolbeare was churchwarden, and Mr. Eales sidesman;—each took a pew on each side, or rather in front, of the reading desk and pulpit, and paid the same annual sum as the others.

By a plan annexed to the faculty it is perfectly clear that each of these pews was intended to form two pews by a division near the pillar; a door was left in the plan. Eales had a large family, and Dolbeare was a man of considerable property:—the partition was omitted to be put up, and a sort of double pew was assigned to each. The site of the seat allotted to Mr. Dolbeare was that of the old reading-desk and pulpit, and a place where women came to be churched. Dolbeare had no fixed seat before. There is not the slightest evidence that by any clause in the faculty he had the possession of the seat allotted to him :—it appears that he was not an unfit occupant of it from his respectability; though the number of his family did not entitle him to so large a seat, for he had a wife and only one daughter. Some time after this he removed to Plymouth with his family, and they all continued there till his death. During his absence other persons were placed in the seats;—on the death of Mr. Dolbeare his widow returned to the parish, and placed herself in the seat;—she sate there

with Mrs. Lloyd and another person, who paid the pew-rent. On the death of Mrs. Dolbeare, in 1816, Mr. Parham, who had married her only daughter and succeeded to her property, seems to have considered that he had a title to this seat. Tozer was resident in the parish: but from a misunderstanding had given up a seat in the chancel, and ceased to attend the church. In 1817 he returned, and wished to have a pew allotted to him;—and it does not appear that any other pew was vacant, as the population had increased.

The affairs of the parish are managed by two churchwardens; one called the town, the other the country-warden. The usage seems to be that the town-warden is considered as the upper church-warden;—he manages the pews, and receives the rent. Whether this would give him a legal right, so considered, is not necessary now to be adverted to. The church was served by Mr. Templar, who had been there two years as curate; and, in order to accommodate Mr. Soper, he conferred with Mr. Abraham, the town-warden, and they thought the best way would be to take off part of the pew occupied by Parham and Mrs. Lloyd, and a small part of another pew, and thus make one pew out of the two for Soper. Mr. Templar solely gave the orders for this, and without any previous communication with Mr. Parham: but it does not appear that he did this out of spite, or ill-will. Mr. Parham was offended, as he might justly be, from want of communication: he thought himself injured.

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After the transaction the parties all met at one of the churchwarden's houses. The churchwardens said that Templar had acted wrong in not giving notice to Parham. Templar allowed candidly that he had acted prematurely in not first consulting Parham ; and Parham, Jun., who was present, said,—“ Put the pew in its original state, and my father will think no more of it.” This was declined, and the suit was instituted in the Court of the Dean and Chapter of Exeter.

The suit is brought and conducted in rather an extraordinary form, viz.—As a criminal suit by articles, not as a civil suit for perturbation of seat. The citation is taken out against *the Rev. John Templar, the Curate of Ashburton, to answer to articles to be administered to him by virtue of the office of the Judge touching and concerning his soul's health, and the lawful correction and reformation of his manners and excesses for his having altered, or caused to be altered, a certain seat or pew in the nave or body of the Church, at Ashburton, belonging to Benjamin Parham, Gentleman, whereby he has taken away and reduced the length thereof two feet two inches, or thereabout, without the licence or faculty of the Ordinary, or any other lawful authority whatever in that behalf ; and also to shew cause why he should not be compelled and admonished to restore the said seat or pew in all respects to its former condition.*

The articles are, for having without authority altered the pew, to the great injury and prejudice of Parham, but not in violation of the general law.

The *First* article sets forth, that Parham and his family had sat in the pew from time immemorial.

The *Second*, that in December, 1817, he had made the alteration in question.

The *Third*, that when the churchwardens were informed of the alteration, they expressed their disapprobation at it.

The prayer is, that the pew should be restored to its original state, and costs given against Mr. Templar.

Looking at these articles both as to the heading and averments, the object seems rather to be that of a civil suit to obtain redress and restitution of the seat; and it ought undoubtedly to have been proceeded in by a suit for perturbation of seat: but being brought as a criminal suit, it becomes subject to all the rules of a criminal suit. Here however answers have been called for to which the promovent is not entitled in a criminal suit.

The Judge of the Court below seems to have considered it in a mixed light, both as a criminal and a civil suit;—he rejected both the sentences offered; by his interlocutory decree “*declared that John Templar had improperly and without due authority divided the seat;—enjoined him to restore it to its former situation, and to certify the same within the space of two months: but that the seat, when so restored, is not the exclusive property, or belonging solely to the family of the Dolbeares under whom the plaintiff claims, either by possession or from time immemorial, or otherwise: but that the same might be allotted to the plaintiff and his fa-*

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mily, and also part thereof assigned to any other family or persons, for the better accommodation of the parishioners, at the discretion of the churchwardens; and he decreed each party should pay his own costs."

From this sentence both parties have appealed:—it would be extremely difficult to make these proceedings in any way regular: but I agree with the counsel for Mr. Parham, that it is the duty of the Court to overlook irregularities in the country jurisdictions, and to endeavour to get at the substantial justice of the case;—there are, however, certain fundamental rules which it is impossible to neglect.—Parham is the promoter of a criminal suit before the Court;—his real object is to establish his own right, and his own exclusive occupancy; and he lays as the groundwork of the whole, that he is entitled to the sole possession by immemorial prescription; and, if the party has interrupted such an occupation, he is guilty of an ecclesiastical offence.

Nothing can be so clear as that this claim has been wholly confounded. The counsel, as any person acquainted with the ecclesiastical law must have done, have been obliged to admit that no exclusive right has been established against the ordinary.—I think he has not established any right as against the parish at large, or as against the churchwardens acting under the ordinary.

Dolbeare had no claim when the church was new seated beyond that of the rest of the parishioners: he was placed there, as others were, by the seating of the churchwardens, it being the clear law of

the country, that the use of the pews belongs to the parishioners ; pews are allotted to them by the churchwardens, subject to the control of the ordinary :—a seating of this kind by churchwardens does not give a permanent and exclusive right ; it is not like a faculty, because it is liable to alterations as the circumstances of the parish may require. When church room is abundant, and the population is thin, persons of large property and large families may have large pews allotted to them, which afterwards may be taken away or diminished if circumstances are different,—if their families become reduced in number, or the church room from increase of population becomes more wanted. The churchwardens may remove persons originally placed in seats or their descendants : but if they do so capriciously, or without just ground, the ordinary will controul and correct them. But the possessor has no exclusive right to the pew ; an exclusive right can only be in virtue of a faculty, or by length of time which presumes a faculty.

Dolbeare's right does not stand on the most favoured ground ; he was churchwarden, had a small family, and took a large pew. He placed himself in violation of the faculty : for it is obvious from the appearance of the plan that the space he took for his seat was intended for two pews. But there can be no doubt but that a mere possessory right ceases when the use and occupation cease, when the family which was in possession leaves the parish ; and for this reason I interrupted the counsel when he talked of a possessory right. When the Dolbeare family removed to Plymouth,

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all their right in the pew ceased. By an error as to the law (for this part of the law is little understood) the widow of Mr. Dolbeare, when she returned from Plymouth, took possession again of the pew as if it were a matter of right, but she was a mere intruder; the churchwardens might have removed her. She sate there in conjunction with Mrs. Lloyd and Mrs. Edwards; she might thus be considered as having acquired a kind of possessory right: but the utmost she could acquire would be the possession of a pew in common with other parties. No understanding with them could give her a legal right.

On her death Parham, by another mistake as to the law, took possession of the pew, as if he had an exclusive and prescriptive title to it. This was a misapprehension on his part; and might have been a ground for the churchwardens to have taken this pew for others, and to have put an end to such a claim.

Mr. Parham was a proper person to be placed in a part of this pew which holds twelve or fourteen persons; and when part of it had been taken off, there would have been ample room for himself and his family.

The Judge therefore was correct in the opinion he gave, that Mr. Parham was properly placed there, and that others might be there placed: but it is difficult to see, how in a criminal suit it could be within the jurisdiction of the Court to pronounce such a sentence. What has Mr. Templar to do with this? How is he found to be respondent in such a case? He only prayed for his

dismissal from the suit. The whole proceeding is so confused it is difficult to set it right; the part which relates to Mr. Parham is substantially correct.

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I am also to consider the sentence, so far as it ordered Mr. Templar to restore the pew to its former dimensions. I must look to the end for which the cause was instituted.—Mr. Parham claims redress for a civil injury :—the Court thinks he has established no right.—Mr. Parham complains that Mr. Templar should have altered the pew without first applying to him.—Templar admits he was wrong in this, and perhaps with this admission Parham should have been satisfied: but he prays that Templar should be compelled to restore the seat ;—the foundation of the criminal offence is the right of Mr. Parham. If that ingredient is taken out of the suit, can Templar be enjoined to restore the pew and to pay costs?

In a criminal suit the defendant is legally entitled to every favourable circumstance arising out of the course of proceedings;—if Mr. Templar had invaded a right as described, he might perhaps have been proceeded against criminally. If he had altered the pew without competent authority, he might have been proceeded against for perturbation of seat. The course pursued is an assertion of right, which not being proved, the foundation of the suit fails.

Suppose Mr. Templar to have altered a pew which only belongs to the parish, Mr. Parham had no right to resist this ; the evidence shews that the alteration had the previous concurrence of one of

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the churchwardens to whom the management of the pews was usually left. My attention has been directed by the counsel for the defendant to the evidence of the churchwarden (Abraham) in the third interrogatory;—"he says the alteration was made in his absence, and without his order; and that he blamed Ireland the carpenter for having made it: but that he did this because he thought the orders for doing this ought regularly to have come from him as churchwarden, and not on any other account; and that he did then, and does now, consider that such alteration was fit and proper to be made, and that he should now approve of making such alteration under similar circumstances.

Here is a seat capable of holding from twelve to fourteen persons and one churchwarden and the curate consult how they can best make room for the accommodation of other parishioners; and they agree to take a piece from this and a piece from another pew;—and after the approval of the churchwarden, but in his absence, Templar gives orders for carrying this into execution. Surely this alters the whole statement of the question,—it is the joint act of the churchwarden and the minister.

The minister merely gives the order in the absence of the churchwardens.—If the curate had acted contrary to the churchwarden, and the churchwarden had proceeded against him, the case would have been widely different. The Court would have pronounced against the curate, for he would have had no authority to alter the seats.

Taking it therefore as a case in which the mi-

nister acted in concurrence with the churchwarden; I am next to consider whether, as the alteration has been made without a faculty, a suit can be maintained, as against an act done without lawful authority.—It is not to be maintained that every little alteration of a pew, where no private rights are infringed, requires a faculty.—No rights of the parish are infringed; the alteration is for the accommodation of the parishioners, and it is a very trifling one.

"In important alterations, where parishioners are to be burthened with additional rates, it is highly proper, and indeed quite necessary, that a faculty should be applied for. (a)

In these times when the population of the country is so much increased; when large sums are granted by Parliament, and associations of private individuals are formed to provide enlarged accommodation;—it would be too much to hold that a minister acting in concurrence with the churchwarden, with no private view but merely to accommodate

(a) Mr. Swayne, the other churchwarden, deposed, that "Mr. Templar never consulted him on the subject; that when it came to his knowledge, considering it an improper act, he expressed his disapprobation thereof; and that, in conversation with Mr. Abraham his co-churchwarden on the subject, he also expressed his disapprobation of the matter to him, that any alteration should be made without first consulting the parties; when Mr. Abraham observed, that he was sorry Mr. Templar should have done it, as he wished also to have consulted the party first, meaning the Parham family. Mr. Swayne in answer to an interrogatory, described himself as warden for the country, and Mr. Abraham as warden for the town."

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the parishioners, should not be able to make a trifling alteration in the seats of the church.

I think a faculty was not necessary,—it was done with the concurrence, and not in defiance of the churchwardens: if the alteration had disfigured the church, and the churchwardens had disapproved of it, or the parish objected to it, I should have felt myself compelled to have enforced the restoration of the pew.

At any rate this is not the offence charged in the articles, it is an offence of a different description. Upon the whole, therefore, I think that Mr. Parham has failed in proof of his articles;—the right is not proved,—the pew belongs to the parish,—and the defendant is not guilty of the charges brought against him.

I reverse the sentence: but considering the irregularity of the Court below,—and in order, if possible, to make the parties meet together without vindictive feelings, I am not disposed to give the whole costs: but I shall give 100*l. nomine expensarum.*

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## PREROGATIVE COURT OF CANTERBURY.

NATHAN v. MORSE.

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*Trinity*  
*Term.*  
June 1st.

**HUGH MORSE** died on the 12th of August, 1820, while he was in the act of dictating instructions for his will to William Christopher, his solicitor, in the presence of Mr. Isaac Joseph ; he had proceeded as far as the clause which contained the appointment of the executor, when he was attacked by the seizure, which terminated his existence. Immediately after his death, Mr. Joseph requested Mr. Cabbage to read over the instructions to him, which he accordingly did ; and then Mr. Joseph observed, that he had omitted a *legacy* of 1000*l.* 3 per cent. consols, to Elizabeth Nathan, for her own use, independent of her husband, upon which Mr. Cabbage, recollecting that the deceased had directed this legacy to be given, immediately, in the presence of Mr. Joseph and another person, who was present, added the legacy which he had omitted.

“ Instructions for the will of Hugh Morse, of King Street, Tower Hill, London, furrier, taken

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this twelfth day of August, 1820. To his mother 1000*l.*, 3 per cent. consols, for her to take the interest for her life ; after her death 500*l.* stock, part of this sum, to the children of Elizabeth Nathan, the wife of Lewis Nathan, of Prescott Street, Goodman's Fields, pen-cutter, that shall be living at the time of his mother's death, share and share alike, to be paid to them as they respectively attain the age of 21, with benefit of survivorship, the interest to be applied towards their maintenance.

To Catharine Williams, of Blackmoor Street, Clare market, two hundred pounds ; and to her five children the sum of 200*l.* each.

To the new synagogue in Leadenhall Street, the sum of 20*l.*

To the Jews' hospital, Mile end, the sum of 5*l.*

At the death of his mother, the remaining 500*l.* stock, part of the above 1000*l.* stock, to my nieces, the children of my late brother Moses Morse to be equally divided between them.

To his nephew, the son of the late Moses Morse, last named, the sum of 50*l.*

The residue of my estate and effects I give to my executor, to be divided by him amongst the before named children of Elizabeth Nathan, wife of Lewis Nathan.

Isaac Joseph, of Sams Coffee-house, executor.

To his daughter, the before named Elizabeth Nathan, 1000*l.* pounds, three per cent. consols, free and independent of her husband."

JUDGMENT.

Sir John Nicholl.

The facts are satisfactorily established.—I have

no doubt in pronouncing this to be the will of the deceased, as far as to the appointment of the executor: but it is perfectly clear that the other part was not committed to writing during the life of the deceased. Although the Court goes the utmost length to give effect to *intention* clearly proved, and reduced into writing in the lifetime of the testator, yet it has never held that any thing added to a will after death can be established. Death consummates the instrument;—nothing can be added afterwards.

The last clause must be pronounced against, and struck out of the will.

I have no doubt of pronouncing for the will without it.

The Judge struck out the clause.

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KOOYSTRA v. BUYSKES and Others.

MARIA VERBRAGGEN, formerly of Woolwich, in the county of Kent, died at Enkhuysen, in Holland, on the 27th of May, 1791. She, conjointly with her sister Catherine Verbraggen, made and executed two wills; the one a general will, the other limited to her effects in England. In both these instruments, Pieter Buyskes, and Arnoldus Buyskes were appointed executors.

In December, 1803, the executors proved the limited will in the Prerogative Court of Canterbury; and on the 25th June, 1805, letters of administra-

If the surviving executor declines to take administration and there is no residuary legatee, the next of kin is entitled to it. If the next of kin decline it, the administration may be granted to a legatee or a creditor; but notice must be given of the application of the legatee or creditor to the next of kin.

the legatee or creditor to the next of kin.

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tion, with both the general and limited will annexed, were granted to John Groves, the attorney of the executor, (who were resident at Enkhuysen) limited to the effects in England.

On the death of John Groves in 1805, letters of administration with the wills annexed were granted to John Thomas Groves, as the attorney of the executor, in his stead. John Thomas Groves has since died; and Peter Buyskes, one of the executors, is dead also.

May 3d,
1820.

An application was made to the Court on the behalf of Bartholomew Kooystra, for letters of administration, on the following ground, *viz.* that he was a legatee named in the general will, and also a creditor of the estate of the deceased; and further, that Arnoldus Buyskes, the surviving executor, was resident at Enkhuysen, and not likely soon, if ever, to come to England. That the deceased, by her general will, made jointly with her sister, gave and bequeathed the residue of her property to the children left behind, and the descendants of the late Dame Petronella Verbraggen, and the children left behind by the Honourable Jan Lambertus Appelnar whilst living, member of the council, and burgomaster of Enkhuysen. That diligent enquiry has been made after the person or persons entitled to the residue under the will. That advertisements had been inserted in the Courier newspaper in England, and the Dutch newspapers called the Amsterdam Courant, and the Haarlem Courant, which advertisements contained a notice of the residuary bequest in the will.

A decree has issued with usual intimation, under seal of the Court, against Arnoldus Buyskes, and

also the person or persons who might be entitled to the residue of the estate and effects of the deceased; and the customary proceedings being made, the decree with affidavits of the due service of it, was returned into Court; and the Court was moved to grant the letters of administration to Bartholomew Kooystra, no appearance having been given for any of the parties cited.

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Per Curiam.

You have given no notice to the next of kin; they are entitled, if there are no residuary legatees. They certainly ought to have had notice:— in foreign property of this description, the Court cannot be too cautious in adhering to the principles of its practice.

If the surviving executor on notice declines to take the administration, there is an end of his claim: then you must go to the residuary legatee; and if there is no residuary legatee, to the next of kin.

I shall direct it to stand over till the next Court day, see what the difficulties are, and consider with the Registrar how they may be avoided.

The motion was repeated, and the administration granted to Bartholomew Kooystra. *June 26th.*

CONSISTORY COURT OF LONDON.

1821.
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June 29th.

TURNER v. GIRAUD.

Answers to a
libel in a pew;
cause direct-
ed to be re-
formed.

IN a suit for a perturbation of seat, brought by Samuel Turner against Richard Hervé Giraud.

The *Third* Article of the libel pleaded,—

That on a Sunday happening in the beginning of September, 1820, Richard Hervé Giraud went to the parish church of Sunbury; and without any lawful authority for so doing, intruded himself into the pew in question in this cause, and occupied the same during the time of divine service in the forenoon of that day.

The answer given to this article was as follows:

To the third position or article of the libel this respondent answers and says, he admits that on a Sunday, happening in the beginning of the month of September, 1820, and prior to Sunday the 17th of that month, he this respondent went to the said parish church of Sunbury, and went with his family into the pew in question in this cause, and sat in and occupied the same during the time

of divine service, in the forenoon of that day : but he denies that he and his family so went into the said pew, or sat in or occupied the same without any lawful authority for so doing ; for this respondent says, that in the year 1816 he became possessed of a freehold estate, consisting of a capital messuage or tenement, and four acres of land ; and also of a farm consisting of between forty and fifty acres of land in the said parish of Sunbury ; and which capital messuage, and the four acres of freehold land thereunto belonging, are now in his own occupation, but the farm this respondent hath let ; and he has ever since been a parishioner and inhabitant of the said parish ; and having in the month of July, 1820, completed the purchase of a certain other freehold estate in the said parish, late property of Edward Boehm, Esq., a part of which the mansion house of the said Edward Boehm, formerly stood ; but which, prior to such purchase, had been pulled down. He, the respondent, was on or about Sunday the 29th day of the said month, duly and lawfully placed and seated in the pew in question in this cause, by James Bean and James Graham Ruff, the then churchwardens of the said parish, being the pew formerly occupied by Edward Boehm, Esq. and his family, and which had always been appropriated since the erection thereof to the use of the owner and occupier of the estate and premises which the respondent had purchased ; and this respondent thereupon gave up or relinquished the part of the pew in the said parish church of Sunbury, heretofore used by him-

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self and his family, and which was insufficient for their accommodation ; and this respondent says, that he is now building a mansion-house for his own residence on or near the site of the house formerly occupied by the said Edward Boehm, and is seized in his own right of other freehold estates in the said parish, and is rated for his estates and premises in the said parish, at the sum of 293*l.* per annum.

Jenner and Phillimore,

Objected to this answer, as redundant, and consequently irrelevant.

Lushington contra.

The ultimate question to be decided will be whether Mr. Giraud was placed in the seat by lawful authority ; and the whole of this detail bears upon the point.

Per Curiam.

It is charged upon you that you entered the pew without lawful authority; therefore, you have a right to assert that it was with lawful authority : but a great deal too much is introduced into the answer ; —it might be commodiously abridged.

Lushington.

This is a most material part of our case : it is necessary for us to shew there was a lawful authority consistent with due discretion.—The purport of the answer is, to set forth that Giraud was placed there by the churchwardens on good and sufficient grounds. That he was a person of property and respectability in the parish, and that there was a particular reason why he should be placed in that

individual pew, because he had purchased Boehm's house, to which that pew had always been appropriated.

JUDGMENT.

SIR WILLIAM SCOTT.

The *third* article of the libel states that the party proceeded against intruded himself and his family into the pew without any lawful authority. Perhaps the word *lawful* is pleonastical ; because, if it were without *authority*, it was without *lawful* authority. In answer to this he has a right to say that he was seated there by authority : therefore, in the beginning of the answers he has correctly replied to the libel : but he goes on to state, that in 1816 he became possessed of a freehold estate, and then that he afterwards purchased another estate. I cannot see the use of this ;—the party will have the whole benefit of this, by the sentence contained at the close of the answer, *that* he is rated for his estates and premises in the parish, at 218*l.* per annum. That general fact shews that he is a proprietor. I do not want his history,—when he purchased one estate, and when another, may be commodiously omitted. He goes on to state, that he was placed by the churchwardens in the pew formerly occupied by *Edward Boehm and his family ; and which had always been appropriated to the use of the owner and occupier of the said estate and premises ; that he is now building a mansion house for his own residence on the site of the house formerly occupied by Edward Boehm.*

Now, it is disclaimed that this is introduced in any way to establish a possessory title ; but it may,

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I think, be fairly enough stated as a consideration addressed to the discretion of the churchwardens. If a house have always had this pew, it may be a fair ground for the churchwardens to place the proprietor of it there. I think there is no objection to the admission of this: but all the history of his purchases may well be dispensed with.

The answers to the *third* article²¹ directed to be reformed.

ARCHES COURT OF CANTERBURY.

TOCKER v. AYRE.

An Appeal from the Consistory Court of Exeter.

1821.
*Trinity
Term.*

JUDGMENT.

SIR JOHN NICHOLL.

This is a suit for defamation brought by Mary Ayre. Two witnesses have been examined to prove the libel; an allegation has been given in by the defendant, on which three witnesses have been examined. The Court below held the libel proved, and gave the usual sentence with costs.—It comes on here upon the same evidence as it did at Exeter.

I cannot agree that suits of this description between persons in the higher classes of society ought to be discouraged, and less attended to than suits of a similar description between persons in a low condition of life; on the contrary, in the higher classes of society acquiescence would be almost an admission of the charge; and as in those

In a defamation suit the testimony of two affirmative witnesses outweighs that of several negative ones.

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classes female reputation is of higher importance and value to the person who possesses it ; if an attempt be made to rob any one of that reputation, there is no other remedy, but reference to this Court, to which the law and constitution of the country has placed the cognizance of such offences.

The charge is, that the appellant said “ *Ayre’s sister was publicly kept by a man at Plymouth, and had a child by him.*” The words were spoken in mixed society amongst persons of a better state in life, and where the statement was likely to be injurious to the party.

It appears that the sister of the plaintiff had been defendant at the Assizes in Cornwall, and had successfully pleaded her own cause:—this had been much discussed in the public prints, and had formed a general topic of conversation.

Two ladies, Mrs. Maclean and Mrs. Strachan, had called on a visit to Mrs. Twynam, who was on a visit at Mrs. Hambley’s. During their call six ladies, and Mr. Tocker, the defendant, were together there, and engaged in a conversation on a paragraph which had appeared in *The Times* that morning respecting Miss Ayre’s defence. It was said Mr. Ayre did not approve of it ; and Tocker stated he would not have had a sister of his own appear so.—Mrs. S———, and Mrs.———, observed, they did not believe that Mr. Ayre had made any such observation :—on this Mrs. Hambley began an attack on Mr. Ayre’s sisters, ladies who were absent and resident at Hampstead :—it is admitted that Mrs. Hambley defamed these ladies,—she said that one of them had had a child,—This has been softened as

having been mentioned as a mere report : but those who propagate such reports assist in the injury, and are parties to the defamation.

So far the witnesses do not disagree : but two witnesses upon the libel depose to a further conversation. Mrs. Short and Mrs. Maclean, they positively and affirmatively swear that in the course of this conversation Tocker said "*that Ayre's eldest sister had been publicly kept by a man at Plymouth, and had had one child ;*"—he was cautioned,—he repeated that he knew it to be true. Nothing can be more direct and positive than the reiterated defamation of Mr. Tocker on this occasion. One witness observed, that, from the confident manner in which he had spoken, he might be the father of the child: both the witnesses agree ; and if they are to be believed, there is no doubt as to the proof.

How is it attempted to contradict this? Four other persons say they do not recollect it. Mrs. Lonme speaks to the best of her present recollection, Mrs. Twynam does the same : but Mrs. Lucy Hambley swears that Tocker only used the words she has deposed to, and did not mention either of the Miss Ayres.

How is the Court to weigh this evidence ? In the first place, the rule of law is, that one affirmative witness outweighs several negative witnesses, because both may be true. Is there any thing to prevent both from being true here? The words may have been spoken, and some one present not hear or recollect them. There were six ladies and one gentleman present: there was much talking; there might be two conversations going on at the same time. Mrs.

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Hambley might make some statements, Mr. Tocker others ; there is no inconsistency in some hearing Mr. Tocker, and others not. No two report the conversation in the same words. No imputation is thrown in the way of discredit on the witnesses, persons possess different degrees of accuracy of recollection. There is no reason not to believe the two witnesses examined on the libel: they must be guilty of the grossest perjury, if what they say is not true. They had no personal acquaintance with Miss Ayre, they gave friendly advice as peace-makers.

Thinking, as I do, that the evidence fully substantiates the charge, and that what is stated by the other witnesses does not amount to a valid contradiction, I am of opinion that the Judge at Exeter did right; and I affirm the sentence, and condemn the appellant in costs.

PREROGATIVE COURT OF CANTERBURY.

WILSON v. WILSON and Others.

1821.
Trinity
Term.
June.

HENRY CLARKE died on the 31st of December, 1820, aged upwards of eighty-three years. He had been in good health up to the 5th of December, when he was seized with a paralytic attack, which so much affected his speech that he was never afterwards able to articulate distinctly.

On the 15th of June, 1811, he executed his will in two parts; the one was very nearly, but not exactly, a duplicate of the other. To the one a codicil was annexed, dated the 8th of July, 1816; to the other a codicil dated 22d of July, 1812;—towards the end of 1816 he cancelled that part of the will to which the codicil of 1812 was annexed.

In 1817 he executed another will at the office of Messrs. Wilson, in Aldermanbury, which was attested by two clerks of the house, and which he carried away with him. After his death, enquiry and search were made for this will without effect. The uncanceled part of the will of 1811, and the codicil of the 12th July, 1816, were found in a tin

Where a later will has been destroyed and a former will left uncanceled it has been a point much controverted whether the former will revives or not; it is a question of intention, and the intention must be collected from all the circumstances of the case. In the Ecclesiastical Court the *primâ facie* of presumption seems to be against the revival.

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box, in which he kept his papers of consequence: but the string which had fastened the sheets together (there were five sheets) was untied, and the several sheets were scattered about the box. The cancelled part of the will, and the codicil annexed to it, and several wills and testamentary scripts were found also in the same box.

The personal property amounted to nearly 60,000*l*.

The uncanceled will of 1811, and the codicil of the 8th July, 1816, were propounded by Mr. Wilson, the executor, and opposed by the next of kin. The facts of the case were admitted in the answers of the parties contesting the suit, so that no witnesses were examined.

*Lushington and Dodson argued in support of the will.*

*Adams and Phillimore for an intestacy.*

The Court took time to deliberate.

July 4.

JUDGMENT.

SIR JOHN NICHOLL.

In this case the Court has taken time to consider the arguments which have been urged in the course of the hearing; and it has taken the opportunity of again carefully inspecting all the testamentary papers which have been laid before it. It has done so, not from any great doubt affecting its own mind, but for the satisfaction of the parties concerned, the property at stake being of great magnitude; and after the best and most mature consideration which I have been able to give to the subject, the impression which was left on my mind, as formed originally upon the result of this case,

has been confirmed and strengthened by a subsequent consideration of it. The case comes on for hearing, amicably, between the parties, and on pleas given in upon both sides, and on answers taken to those pleas: but no witnesses have been examined on either side; there is, therefore, no conflicting evidence with respect to the facts of this case. The party deceased was a Mr. Henry Clarke, who died at a very advanced age upon the 31st of last December. About twenty-five days before his death, he was struck with palsy; and from the effects of that attack he never afterwards became so recovered as to be of testamentary capacity. He left behind him a (*a*) brother and a sister, and the son of a deceased brother, and seven children of a deceased sister, who will be entitled in distribution, in case it shall be determined that the deceased is dead intestate. The amount of his property, (all personalty) is stated to be from fifty to sixty thousand pounds. The deceased made several wills; one of them appears to have been made in the year one thousand seven hundred and ninety-seven, and has a codicil, dated (I think) in one thousand eight hundred and two;

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(*a*) Mr. William Clarke, his brother; Mrs. Hannah Wilson, widow, his sister; the Rev. Robert Clarke, the son of the Rev. Sloughter Clarke deceased, the deceased's brother; and Henry William Gordon, Augusta Maria Halce, widow, Charlotte Matilda Shire, widow, Henrietta Augusta Gwynne (wife of the Rev. William Gwynne), and Anna Maria Wallinger (wife of Mr. Joseph Wallinger), the children of Anna Maria Gordon, deceased, a sister of the deceased's.

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another will is dated in one thousand eight hundred and seven; another in one thousand eight hundred and eleven; and there was another will in one thousand eight hundred and seventeen. The writing of these several testamentary instruments by the deceased himself, and his testamentary capacity at the several times of writing them, are fully admitted. These several papers (except the will of one thousand eight hundred and seventeen) together with several abstracts of them, or lists of legacies taken from them, and old cancelled wills, were found after the deceased's death in a tin box in his house. Three other papers of a testamentary nature, which are marked O, P, and Q, are, I think, duplicates of old wills; and were delivered by the deceased into the possession of Mr. Wilson, to be deposited in an iron safe in his house in Aldermanbury; and there they remained till after the deceased's death. The will of one thousand eight hundred and seventeen was not found after the deceased's death: but it is admitted that he executed such a will. The Answers state that *"the said deceased on or about the month of June, in the year one thousand eight hundred and seventeen, called at the counting house of the respondent with whom he had many years before deposited several of his former testamentary papers, and at such time did produce to the respondent, in the presence of his late partner, Thomas Watson, and his clerks, a paper purporting to be a will, which he brought with him for the purpose of being executed; and that he thereafter executed his said will"*



*in the presence of Thomas Watson and his clerks, two of whom James Rixan Oliver and Henry Watson, respectively signed their hands thereto."*

He also admits that the said Thomas Watson, his late partner, was in the latter end of the year 1816, and during the greater part of 1817, in an ill state of health; and that he died in the latter end of the year 1817. The execution, therefore, of this will of 1817, in the month of June in that year, is very clearly and distinctly admitted. The paper propounded is that which is marked with the letter A.; it is signed by the deceased, and is dated June 15th, 1811—the same date with another cancelled will, which is marked B. It is the paper propounded by Mr. Wilson, one of the executors named in it; and it is opposed by the next of kin who maintain that the deceased is dead intestate.

For the more clearly understanding of this case, it may be proper thus to describe the several testamentary papers which are before the Court; or rather, perhaps, the state in which they are.

The will of 1797, with a codicil of 1802, which is marked E., is crossed through; and there is a memorandum at the end of it, in the deceased's handwriting "expunged the whole of this will, July, 1807." The will of 1807 is marked C.: that instrument is executed in the presence of two witnesses; it is contained in five sheets of paper, and appears to have been carefully cancelled when the deceased executed a subsequent will, in 1811. There is this memorandum on it, *cancelled this will when I executed another dated the 15th June, 1811; the same being entirely written by myself,*

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*and subscribed as witnesses to the same Mr. Joseph Yellowly and Nathaniel Clarke."*

Q. is an authenticated copy of the will of 1807; and was one of the papers which were deposited in the iron chest in Aldermanbury. So that from hence it appears that when the deceased executed the will of 1807, he cancelled that of 1797; and again, when he executed the will of 1811, he cancelled that of 1807.

A. and B., as I have already mentioned, are both dated on the 15th June, 1811: but from internal circumstances in paper A., which were pointed out in the course of the argument, it seems to have been originally written before paper B. Paper A. is not cancelled: but the sheets that had been apparently attached together by a tape were found detached and separate from each other, though folded up together. In the margin of A. there is an abstract of the different legacies which are contained in it; and there are some notes also and explanatory observations, with respect to certain alterations in the body of the paper itself. There are besides, several alterations and interlineations both in the body and towards the conclusion of this paper, mentioning the number of sheets it contained, which number appears to have been altered twice; first, from four to five, and then back again to four. So that paper A. appears to have contained, at different times a different number of sheets. The first sheet, as it is at present introduced into the paper, has every appearance of not having been originally the first sheet: but it seems to have been since substituted.

In a blank sheet at the end of paper A. is a codicil revoking a legacy, which had been previously revoked in the third sheet of A., by a marginal note. It is a legacy of 50*l.* to a female servant. That codicil is dated 8th July, 1816.

There is a similar revocation in paper B., and contained in almost the same words; that is dated in 1811. In addition, there is an explanatory note, written by the deceased, stating, that he had very fully revoked such legacy. He says, "I consider I have expressed myself clearly, that the share of 200*l.* left to her husband, of which one moiety is my property, is not to be considered as a legacy to either of them," (meaning the husband or the wife.) There is no date to this note. Now this writing on the blank sheet at the end of paper A., dated the 8th of July, 1816, is the latest date upon the instrument itself. But at what time it was that the several sheets of paper A. were disconnected from each other, or when the new sheet was first written or substituted in that paper; or when these marginal abstracts and observations were made,—there is no satisfactory proof to shew. These facts must be matter of conjecture; and I think, of conjecture only. Paper B. is of the same date as A. originally; and though written afterwards, in the first instance, and probably then only in substance a duplicate of the other; yet I think it had originally this important difference from A., That in paper B., the residue is given solely to Mr. Slaughter Clarke; and in paper A. the residue is given jointly to him and to his brother William.

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In case of their death, in the lifetime of the testator, the residue is given to the son of Mr. Sloughter Clarke as the substituted residuary legatee.

How these important differences arose originally between these two instruments, and why both of them are of the same dates, it is impossible for us now to conjecture. The deceased was certainly a very old man; aged, I think, nearly eighty years. They might be perhaps owing to some accident, or they might be occasioned by some oversight on his part. There is abundant evidence to shew, that paper B. was written after paper A., as I have said. Paper B. is carefully cancelled;—at least the *first*, *fourth*, and *fifth* sheets are carefully cancelled. The *second* and *third* sheets do not appear. They have been destroyed; and it must be presumed that they have been destroyed by himself. The time at which this act of cancellation of paper B. took place does not perfectly appear; and, in the absence of sufficient evidence, it would be vain even to conjecture in respect to that fact. Possibly it might have been at the time when the deceased executed the will of 1817. It might however, for ought that appears to the contrary, have been at any other time. Upon the back of it there is a written memorandum: but that equally leaves the time unascertained. That memorandum is in these words, “*These five sheets or four, as entered as parts of my will, are marked with my signature, taken off by myself; reserving only to direct an alteration to any future legacy I may think of.*”

To this memorandum there is no date; and, therefore, it is not known when the act of cancellation took place.

Now what might be the effect of this cancellation, if there had been no subsequent will executed, seems quite unnecessary to decide, because there is a subsequent will executed, which I think places the thing quite sufficiently before the Court, for its decision; for that subsequent will of 1817 revoked both these papers A. and B.

Then the question comes, whether paper A. has been subsequently revived in any way whatever?

The execution I have mentioned of the will of 1817, in its force and its effect, so long as it continues in existence, is a clear and distinct revocation of the paper A. The revocation of paper A., therefore, is not a matter of doubt, but of clear intention; and if that observation required to be strengthened by any other remarks, they might be easily found. But this execution of the will of 1817 is not done hastily, and as a transient intention; but deliberately and formally. He did not even rely on his own handwriting in the body of the paper, and his signature of the instrument, in order to give effect to that will of 1817, as he had before to the will of 1811. But he carried it to Mr. Wilson's, to execute it there in the presence of two witnesses; and they attested the act. If, then, the former will of 1811 had been executed in a manner equally regular; if it had remained in the most perfect state, instead of being pulled to pieces and altered and abridged in the margin, and interlined, as it now appears to have been;—it

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would still be completely revoked, so long as the subsequent will continued to exist. So long as that continued to exist, the intention of the testator to revoke the former will now propounded was by no means equivocal or doubtful; but perfectly distinct and decided. But this will of 1817 is not forthcoming. It was not found upon the deceased's death; and from the circumstance of its never having been traced into any other hands but the last that we hear of it being in, that the deceased, immediately upon its execution, put it in his pocket, and took it away with him, it must have been destroyed, (it is to be presumed,) by the deceased himself.

Now, of the time of its destruction there is not the least evidence whatever. Whether it was on the day after the will was made, or on the day after the deceased's incapacity commenced, or at any intermediate time between the one and the other of those events, there is nothing before the Court to shew. The time must be mere matter of conjecture. We have no declaration coming from the deceased himself upon the subject. We have no fact from which the time of such destruction is necessarily to be inferred. Mr. Watson, who was interested in that will, and who was probably one of the executors named in it, (for he was an executor under the former will,) dies in the latter end of 1817. It may possibly, but not very probably, be that the deceased destroyed the will upon that event happening. I say it is possible, but not very probable; because, at the time when deceased executed the former will, it clearly appears from his

own handwriting that Mr. Watson was in a bad state of health; and the deceased himself mentions that probably that gentleman's life was no better worth than his own. It is not, therefore, very probable, I think, that the event of Mr. Watson's death should have induced the destruction of the will of 1817. Who was the residuary legatee named in the will of 1817 is not directly proved. The brother, Mr. Slougher Clarke, was the sole residuary legatee in paper B., which, as I have before remarked, was originally written subsequently to A. In paper A., also, he was named joint residuary legatee. Both these instruments are dated in June, 1811. Therefore it is to be presumed that he was interested in the residue of the will of 1817. It is stated that he died in April, 1820. That event, added to the death of one of the executors, (Mr. Watson,) which I have already mentioned, is not unlikely to have induced the destruction of this will by the deceased. But I state this of course as mere conjecture. It is not a fact upon which the Court is warranted in relying. The only fact is, that the will of 1817 not being forthcoming, it must be presumed to have been destroyed by the deceased. Then comes the consideration of what is the legal effect of that fact?

Is it to set up this paper A., which in its original state may not have been considered at all as his will, but was meant perhaps as a sketch of the will which was executed on the fifteenth of June, 1811, B. being more formal than A., and in its altered state may have been only used as the draft for the will of 1817.

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Whether, by the destruction of that will of 1817 and other circumstances, this paper A. be revived or not, is the question which this Court has now to decide.

Now the legal presumption as to whether, by the destruction of a later will, the revival of a former uncanceled will is to be presumed, is a point that has been much controverted, but never very clearly settled. And perhaps the bare legal presumption upon such a case is not very material to be discussed. In the case of *Glazier and Glazier*, (a) so far as respects the disposition of lands, Lord Mansfield is reported to have said that the former will is revived. But the correctness of that report and the soundness of the doctrine there laid down have been a good deal questioned. In these Courts, as applies to wills respecting personalty, the presumption has been rather the other way, and against the revival of the former testament; it has been held that it requires some act to shew an intention of such revival. As far as my own opinion goes, I cannot help saying that good sense and the reason of the thing seem rather to favour the presumption as taken in these Courts. But the truth is, that in all these matters the legal presumption must grow out of something in evidence before the Court;—and in fact a case can hardly by possibility be so destitute of all circumstances as to require a decision upon mere legal presumption, and nothing else. In the case of *Moore and De-latorre*, (b) before the High Court of Delegates, I understand it was clearly held by that Court, that

(a) 4 Burrows, 2512.

(b) Vol. I. p. 375.




whichever way the presumption of revival might be, still the intention was to be collected from all the circumstances of the case.

Now, if the Court is to collect the intention in the present instance from all the circumstances of the case, the intention to revoke this will, and the subsequent actual revocation of it by the will of 1817, being quite clear and unequivocal ;—the contrary intention to *revive* it remains to be shewn, as growing out of all the circumstances. Here, however, the intention to revive it is not supplied either by the paper itself, or by any parol declaration made by the deceased, or by any change in the condition of this party. If such intention is to be collected at all, it can only be collected in some of those other papers which were found in the deceased's possession. On the face of the instrument itself nothing appears ;—there is no memorandum, no recognition of it in any way subsequent to June 1816 ;—the subsequent will being, as we have seen, executed in June 1817.

The other papers before the Court were found in company with this instrument in the deceased's tin-box. It was the habit of the deceased to make abstracts of his testamentary papers: these are lists of the legacies, for the most part, contained in the testamentary papers. He also had the habit of keeping old cancelled wills in his possession. There are a variety of them before the Court :—but when some of them were written,—how many times they have been altered and added to,—and from what papers some of them have been extracted, must be almost entirely matters of conjecture.

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The papers F. and L. are abstracts of the will of 1807 ; and M. seems to be no more than a list of the legacies, placed in different columns. Whether they are the legacies of that will, or of any other will, it is perhaps not very material to know.

Paper D. is headed " legacies in my will dated the 15th June, 1811." That is written on the back of an old letter, and is on paper with the water-mark of 1810.

Paper I. is of the same description. It is an abstract of the will of 1811, is on an old letter, and on paper also with the water-mark of 1810.

Paper K. is another abstract of the will of 1811: but the water-mark on that paper is 1815.

Paper G. is also written upon the back of an old letter : but that letter is dated on the 3d July, 1816. A part of it is described " Extract of legacies in my will, dated June, 1811." That applies to the first and second columns. The third column and the fourth column are described, " Money devised by my will ; trust-money in the funds devised." These two columns are dated in 1818.

In Paper A. is an enquiry whether the deceased could alter the residuary bequests of his will by a codicil ?—whether there had not lapsed a sum of 500*l.* Reduced to Mr. H. Gorden, who appears to be a legatee in 1,500*l.* by the will ;—and the form of revoking such legacy is drawn at the end of the paper. But there is nothing to fix the date as to when this was written.

These are the several abstracts ; and two of them, G. and H., have been particularly relied on. The fourth column of paper G., which I have

already mentioned, and which, folding back the letter, was perhaps the first part that was written of it, is intituled, "Extracts of my will (dated) in 1811." Hence, it is probable that it was written some time subsequently to July, 1816. For what purpose this paper was written must, like many other circumstances in this case, remain mere matter of conjecture. Whether it was preparatory to the new first sheet of paper A., or preparatory to a new will, or whether this first sheet in paper A. was preparatory to the new will of 1817, does not satisfactorily appear. But it does clearly appear that the second and fourth columns of paper G. were written before the first sheet of paper A.; and were originally an abstract of the first sheet of paper B., and possibly also of the first sheet of paper A.; because, perhaps, the first sheets of A. and B. were originally the same. The legacies are the same as in B., the cancelled paper: but they were afterwards altered, and made the same as they subsequently stand in paper A. For example: the first and second legacy are the same in both;—he leaves one thousand pounds to his brother W. Clarke, and ten thousand pounds, three per cent. Reduced Annuities, to his brother Mr. Sloughter Clarke. These are the same in both papers; in papers A. and B., and in the abstract. The third legacy is a legacy to his sister, Mrs. Wilson; the interest of 2,000*l.*, and, after her death, the principal to her sons. Now in paper B., that stands 5,000*l.*; so too it was originally in paper G. It is, however, in this abstract G., altered from 5,000*l.* to 2,000*l.*; and now, in the first sheet of

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paper A., it is restored to 2,000*l.* ; so that paper G. is originally an abstract of paper B. ;—it is then altered, and after that paper A. is made.

The same observation applies to the new legacy,—that to Mrs. Remington. In B. it is 500*l.* ; in this abstract it was 500*l.* : but it is now altered in this abstract to 300*l.* ;—and in the first sheet of A. it is 300*l.*

The next legacy in this abstract is that to his nephew Mr. Samuel Clarke, of 2500*l.* Navy 5 per Cents. That does not occur as the next legacy in the new paper A. : but there is an intermediate legacy. There are two money-legacies of 1,000*l.* to each of his two nephews, H. Wilson and W. Wilson : and these two intermediate legacies, which are to be found in the first sheet of paper A., are added at the end of this paper in a different ink and handwriting. This confirms my supposition, that the abstract G. is not made from paper A., but made before it, and that A. was made from this. But this is more decisive with respect to the fifth sheet of paper A. In paper B. (the original paper,) there is 1,500*l.* given to H. and W. Wilson, in trust for their sister Harriet Newbury. In paper G. that stood originally in the same way : then that is bracketed ;—there is written opposite, “lapsed :” (I suppose Mrs. Newbury died in the mean time.) It is then interlined, “to her son Christopher Newbury, 500*l.* ;”—this is just as it originally stood in paper B. But subsequently to this, paper A. was written ; because there it stands only 500*l.* to Christopher Newbury.

These six legacies were contained originally in


the first sheet of paper B. :—that contains the whole of them ; but it is not an abstract of the first sheet of paper A. On the contrary, this abstract shews that it was made preparatory to the new sheet, which has been made and substituted for paper A.

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Other observations arise which tend only to confirm the fact that paper B. was first written : then G. is an abstract from that. Paper A., I should premise, is the first written of the whole :—then paper B. is written and executed. Both are dated in June 1811. Then in 1816 the third and fourth columns of paper C. were abstracted either from paper A. or paper B. (if they were both the same at this time) and after this the first sheet of paper A. was added. If the Court were to indulge in conjectures, I should say that the most probable conjecture is, that this new first sheet was substituted at the time for the purpose of making preparation for that new will which was in part executed in the year 1817.

There is nothing to shew that the instrument A. was ever used after the execution of this will of 1817 ;—for if paper A. was the draft of this new will, why then an abstract made in the year 1817 would more probably be the abstract from that new will of 1817. If transposing the draft for taking that new will, (which to a person of eighty years of age was no doubt a matter of considerable difficulty, and required considerable time to effect,) the leaving the date of this paper unaltered are all consistent with the several heads for the draft of this new will of 1817 : if the Court could assume

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this to be the fact, there is an end of all doubt upon the case. For no one would conclude that a testator destroying an executed will could by that act revive the mere draft of that will.

The other columns of paper G., I mean the first and second columns, have at the top of them the date 1818. Whether these are copied from an original paper of that date or not we have no satisfactory proof.

Paper H., which is partly only a duplicate of G., has the date of June 1818, written at the top of it. "Extracts from my will dated June 1818." But there is nothing to prove that they are not extracts of the will of 1817. There is nothing to shew that the will of 1817 was not in the legacies, or in most of them at least, conformable to the will of 1811. Even paper H., though it has some of the legacies omitted, possibly is also made from the wills of 1817; and for this reason, because the revoked and lapsed legacies, which are contained in paper A. are not included either in the first or second columns of paper G. or paper H. For example,—there is the legacy to Octavius (Clarke); that is not inserted in these abstracts, but it remains in paper A. The legacy to Mrs. Snarey is not to be found in this abstract. The bequest of the shipping to Mr. Wilson is not contained in it. The legacy to Mr. Dare is lapsed. The bequest of Saxon's debt is omitted. Now all these circumstances, (as far as they make something of probability,) tend rather to shew that this abstract, dated 1818, was made from the will of 1817, and not from the old will of 1811.

If so, (if that be probable) this abstract will not tend, in the slightest degree, to shew any intention to revive paper A. after the destruction of the will of 1817. It will only tend to this inference; that the will of 1817 was not destroyed till after these two abstracts G. and H. were written.


It is observable that in neither of these papers G. nor H., where they have the date "1818," affixed to them (for it is pretty satisfactorily shewn, I think, that the third column of paper G. was written before paper A. was altered) there is no mention whatever of who are the residuary legatees; and we have no evidence as to who was the residuary legatee appointed in the will of 1817.

Indeed it is evident that the mind of the deceased, at various times, fluctuated as to the disposition of the residue of his property. By the will of 1797, which is marked E., the brother, William Clarke, is the sole residuary legatee. In the will of 1807, the brother William, and the nephews Henry William, William, and Robert Clarke, are all four of them jointly declared to be such legatees.

In the will of 1811 paper A., which was first written, the brothers William Clarke and Sloughter Clarke are jointly residuary legatees. And in case of their death in the lifetime of the testator, the son of Mr. Sloughter Clarke (W. W. Clarke) is substituted as residuary legatee. In the will of 1811, marked B., which is more formally written than paper A., the brother, Mr. Sloughter Clarke, is the sole residuary legatee. When that will was cancelled, there is, as I have before said, no proof: he might have left it uncanceled till he had formed a

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draft for the will of 1817 ; and even till after he had executed that will. For here is, in his own handwriting, an inquiry whether he could alter the residuary disposition of his property by a codicil ; —it does not appear when that codicil was written, however. Surely then it would require very satisfactory proof indeed, to shew an intention on the part of the deceased to revive this important part of paper A. (as to the residuary disposition intended by him to be made :) which, by the death of Mr. Slaughter Clarke, will vest solely in Mr. William Clarke.

It is quite impossible to say what the purpose was, for which the papers with the mark of G. and H. were written. Still less can we say, that they were written after the will of 1817 ; and consider paper A. as his operative instrument. All these markings and crossings off, and additional legacies of paper G., (for there is an entire column in paper G. tending to shew that it was meant to alter the legacies of the will of 1817) ; all these, I say, might be preparatory to a new will made in 1819 ; and if, by what there is in the lower part of the same paper, he meant to see what his property was, it might be for a new will to be made in 1820, after the death of his brother, Mr. Slaughter Clarke, who was deeply interested in the will of 1817 ; or possibly the deceased, who was very far advanced in life, might find the arrangement of his large property so difficult, that he destroyed the will of 1817, and determined to let the law take its course in distributing his property among his family. True it is, that all this is conjecture ; but we have nothing



else left to guide us here ; and I only mention this to shew how dangerous it would be to carry it any farther. There being, then, no direct act of revival of paper A., either on the face of the instrument itself, or in any other document before the Court, that comes before it from under the hands of the deceased himself ; I am next to inquire, “ whether there be any intrinsic circumstances in this case that shew he intended to revive and set up this will of 1811.”

So far from it, the few circumstances that do arise bear just the contrary inference.

There is not the slightest change of condition on the part of the deceased, tending to shew that he meant on that account to revive this paper of 1811. A circumstance of much consequence where the intention to revive a former will may be inferred from the latter will. Suppose that a person had made a will in favour of a wife ; or in favour of one of his children in preference to the others, giving a large proportion to such wife or child of his property. Suppose he makes a subsequent will on some sudden anger or passion, that subsequent one cutting off his wife or child ; and say that almost immediately afterwards he should be reconciled to them, and the subsequent will should be destroyed,—the former one remaining uncanceled ;—and that for the remainder of his life the testator lives in entire harmony with the wife or child.—Why, facts of this sort would leave no doubt in the mind of the Court that the deceased considered his former will to be revived, and

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looked upon it as operative for the remainder of his life.

But here this will of 1817 is a deliberate act, more so than ordinary. That will the deceased had executed in the presence of witnesses. But he had not executed the paper of 1811 in the presence of witnesses. Why he destroyed the will of 1811 does not appear. This instrument of 1811, paper A., (if, indeed, it was not intended for the copy of a former will, or for the mere will of 1817,) is not left in any formal state, but just the reverse. The sheets are disconnected one from the other. It is left with marginal notes and alterations. One of the legatees is dead. One of the executors is also dead. The most important person connected with the document,—Mr. Sloughter Clarke,—is dead. He was the residuary legatee; and by his death the whole of this residue would go to his brother, Mr. W. Clarke. From the circumstance of Mr. Sloughter Clarke's being joint residuary legatee in paper B., and his son being appointed to succeed him in the event of his death, during the testator's lifetime, it would seem that that was the favoured branch of the family.

Under all these circumstances, to suppose that the deceased meant to revive this instrument, (paper A.,) and intended these sheets of paper, without any alteration, to operate as his will, really appears to me to be the very height of improbability.

It is said that the deceased intended to die testate; and so he did, for several years, for a very considerable portion of his life. But it is mere conjecture

that he did so after the destruction of his will of 1817; and more particularly, after the death of his brother, Mr. Sloughter Clarke. But the question for the Court is not—whether he intended to die testate or not; but whether he meant to revive this instrument which is now propounded.

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If he did not intend to revive it, there being no valid will,—the law makes him dead intestate. Now from all the circumstances of this case,—(which I have alluded to, with considerable minuteness, rather for the satisfaction of the parties concerned, than as thinking that the case itself is fraught with that degree of doubt and uncertainty, which should make so minuté a recapitulation necessary,) I am by no means satisfied that it was the intention of the deceased to revive his will.

On the contrary, I think that the deceased did not intend this paper to operate as his will at all, and that I am bound to pronounce against it;—and that, so far as appears to this Court, it was his intention to die intestate.”

## ARCHES COURT OF CANTERBURY.

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*The Office of the Judge promoted by*  
ROSE v. LEE.

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1821.  
*Trinity*  
*Term.*  
July 14.

*By Letters of Request from the Rector of Lincoln*  
*College in the University of Oxford.*

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Letters of request from the rector of Lincoln College, in the University of Oxford, rejected; there being no sufficient proof that the rector of Lincoln College was entitled to exercise peculiar jurisdiction in the parish of Long Coombe, within the diocese of Oxford.

**THIS** cause was promoted by the Rev. Charles Rose, Clerk, styling himself Chaplain of the parish church of Long Coombe, which he alleged to be situated within the peculiar jurisdiction of the Rector of Lincoln College, in the University of Oxford, against the Rev. Bartley Lee, Clerk of the said parish of Long Coombe, concerning his soul's health, and the lawful correction of his manners and excesses : but more especially for interrupting the said Rev. Charles Rose in the performance of Divine service, in the said church of Long Coombe, and also unlawfully, and without any just right,

continuing himself to perform Divine service herein.

The articles were as follows:—

First, We article and object to you the said Bartley Lee, that his late Majesty, Edward the Fourth sometime King of England, by his letters patent under the Great Seal of England, dated at Westminster, the 11th day of November, in the 18th year of his reign, being the year of our Lord 1478, did for him and his heirs grant licence to the Abbot of the monastery of Eynesham, in the county of Oxford, and to the convent of the same place, that they might *give, grant, appropriate, unite, and incorporate*, the said parish church of Long Coombe in the said county of Oxford, and then diocese of Lincoln, with the rights and appurtenances whatsoever, (which said church was of the patronage of the said abbot and convent,) to the rector or warden of Lincoln College in Oxford, and then diocese of Lincoln, and to the scholars or fellows of the same place and their successors, and to the said rector or warden, and scholars or fellows, and their successors, that they might acquire and receive the said church, with the rights and appurtenances whatsoever from the said abbot and convent ; and the same church so appropriated might enjoy and hold to them and their successors, to the proper use of the said rector or warden, and scholars or fellows, and their successors for ever. So nevertheless that the said church *should be sufficiently*

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*served by a fit chaplain removeable at the will of the rector or warden of the College aforesaid for the time being, and without fine or fee, to be taken or paid to the use of the said King. And we further article and object to you the said Rev. Bartley Lee, that the Right Reverend Father in God Thomas Rotherham, by Divine permission sometime Lord Bishop of Lincoln, and Lord High Chancellor of England, did by his public instrument and final sentence or decree, bearing date the 20th day of November, in the said year of our Lord 1478, by and with the consent of the Dean and Chapter of his Cathedral Church of Lincoln, and of the Abbot and Convent of the Monastery of Eynesham aforesaid, in his diocese of Lincoln, and also of the Archdeacon of Oxford, then in the said diocese of Lincoln, did in pursuance of the said letters patent or licence of his said Majesty King Edward the Fourth amongst other things, unite, annex, incorporate, and appropriate, the said parish church of Long Coombe, with every its rights and appurtenances, to the said rector, or warden and scholars of Lincoln College aforesaid, and their successors whomsoever in future, and to the said College itself; and grant the same to be possessed to the proper use of the said rector and scholars, and of the said College for ever. And the said Bishop did grant to the said rector, or warden and scholars, that it should be lawful for them by themselves, or their lawful proctor, to enter*

the said parish church of Long Coombe, so soon as the same should be vacant; and freely and lawfully to take and obtain corporal possession of the said church, and to retain and continue the same, and lawfully to receive and have the fruits, rents, and profits of the said parish church, and freely to dispose of the same, the licence of the said Bishop, or of any other whomsoever, not being thereupon otherwise had or obtained; and the said Bishop did thereby give licence and authority. Provided always that the said church of Long Coombe should be properly and laudably served in Divine offices, and in the administration of Sacraments and Sacramentals, by able and *fit secular chaplains moveable*; and to be removed at the will and pleasure of the said rector or warden, and his successors, as upon inspection of the records and statutes of Lincoln College aforesaid, to be produced at the hearing of this cause, will appear.

second, Also we article and object to you the said Rev. Bartley Lee, clerk, that you being chaplain of the said parish and church of Long Coombe, and the Rev. Edward Tatham, Doctor in Divinity, Rector of Lincoln College aforesaid, having a mind and desire, under and by virtue of the power and authority vested in him as aforesaid, to remove and dismiss you the said Rev. Bartley Lee, from being and continuing any longer such chaplain, did by a certain paper writing under his hand bearing date, at Lincoln College aforesaid, the 30th

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*day of November, 1820, give notice to you the said Reverend Bartley Lee, that he removed you from the said chaplainship of the said church of Long Coombe, and that he should immediately nominate and appoint some other person to officiate as chaplain in the said church and parish, and desired that you would not officiate any longer in the said church, of which paper writing a true copy was delivered to you the said Bartley Lee on or about the first day of December, 1820. And we further article and object to you the said Bartley Lee, that the said Rev. Edward Tatham did by writing under his hand bearing date the said 30th day of November, 1820, duly nominate and appoint the said Rev. Charles Rose, Clerk, Fellow of Lincoln College aforesaid, to be chaplain of the said church of Long Coombe.*

Third, Also we article and object to you the said Bartley Lee, that in supply of proof of the next preceding article we exhibit and hereto annex to be herein read and inserted, and taken as part and parcel hereof, two certain paper writings, marked No. 1. and No. 2.; the said paper writing, marked No. 1. being the original notice of removal and dismissal of you the said Bartley Lee, from the said chaplainship of Long Coombe as set forth in the next preceding article, beginning thus, "I hereby give you notice as chaplain, commonly called 'curate of Long Coombe,' ending thus, "Dated Lincoln College, the 30th day of No-



"vember, one thousand eight hundred and  
 "twenty," and thus subscribed, "Edward Ta-  
 "tham Rector ;" the said paper writing No. 2.  
 being the original appointment of the said Rev.  
 Charles Rose to be chaplain to the said church  
 of Long Coombe, as also mentioned in the  
 next preceding article, containing as follows ;  
 "I hereby nominate and appoint the Rev.  
 "Charles Rose, B.D., Fellow of Lincoln  
 "College, Chaplain of the church of Long  
 "Coombe. Edward Tatham, Rector of Lincoln  
 "College, 30th of November, 1820." That  
 the whole contents of the said two paper  
 writings, and the subscriptions thereto, were  
 and are of the proper handwriting and sub-  
 scription of the said Rev. Edward Tatham,  
 Doctor in Divinity, Rector of Lincoln College  
 aforesaid.

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Fourth, Also we article and object to you the said  
 Bartley Lee, that on Sunday the            day  
 of the month of December, 1820, the said  
 Rev. Charles Rose, Clerk, the chaplain of the  
 said parish and church of Long Coombe, re-  
 paired to the said church at the usual hour of  
 performing Divine service therein in the fore-  
 noon ; and proceeded to the reading desk in  
 the said church, when no person was therein ;  
 and Thomas Bumpus, one of the Churchwar-  
 dens of the said parish, who had been named  
 and appointed as such Churchwarden by the  
 said Bartley Lee, then prevented the said  
 Charles Rose from going into the said reading  
 desk. That the said Bartley Lee having soon

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afterwards gone into the said desk, the said Charles Rose again proceeded to the said desk, and required and demanded to be admitted therein for the purpose of performing Divine service, as chaplain of the said parish and church, but was unlawfully obstructed and interrupted by you the said Bartley Lee, in the performance of such Divine service. And that you the said Bartley Lee did then perform such service therein. And we further article and object, that you have unlawfully, and without any just right, continued to perform Divine service in the said church, and that you have caused a lock to be placed on the door of the pulpit therein which is kept constantly locked, and of which lock you have kept, and still keep possession of the key.

Fifth, Also we article and object that you the said Rev. Bartley Lee were and are of the said parish of Long Coombe, in the county of Oxford, and *peculiar jurisdiction* of Lincoln College in the University of Oxford within the province of Canterbury; and therefore and by reason of letters of request under the hand and seal of the said Rev. Edward Tatham, Doctor in Divinity, Rector of Lincoln College aforesaid, exhibited to us the official principal of the Arches Court of Canterbury aforesaid and now remaining in the registry of this Court, were and are subject to the jurisdiction of this Court.

Sixth, Also we article and object, that the said Rev.

Charles Rose, Clerk, Fellow of Lincoln College aforesaid, Chaplain of the said parish and church of Long Coombe, hath rightly and duly complained of the premises to us the official principal aforesaid, and to this Court.

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Seventh, Also we article and object to you the said Bartley Lee, That all and singular the premises were and are true, public, and notorious; and of which legal proof being made, the party promovent prays right and justice to be effectually done and administered in the premises; and that you the said Bartley Lee, for your excess and temerity in the premises, may be pronounced, decreed, and declared to have incurred the penalty and censure of the law, and that you may be duly and according to the exigencies of the law corrected and punished for the same, and admonished to refrain from the like behaviour for the future.

The exhibits annexed to these articles were,

To the Rev. Bartley Lee.

I hereby give you notice as Chaplain, commonly called Curate of the church of Long Coombe appropriated, annexed, and united, with Lincoln College, in the university of Oxford, that I remove you from the said Chaplainship under the powers which are vested in me by the statutes and authorities of the said College. And I further give you notice, that I shall immediately nominate and appoint some other person to officiate as Chaplain in

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the said church and parish thereunto belonging. And I desire that you will not officiate any longer as Chaplain of the said church. Dated Lincoln College, the thirtieth day of November, one thousand eight hundred and twenty.

EDWARD TATHAM, Rector.

I hereby nominate and appoint the Reverend Charles Rose, B. D., Fellow of Lincoln College, Chaplain of the church of Long Coombe.

EDWARD TATHAM,  
Rector of Lincoln College.

30th Nov. 1820.

*Swabey, for the Rev. Bartley Lee, and in objection to the admission to the articles; stated that the Court had no jurisdiction, and could not receive the letters of request.*

That if the jurisdiction existed, it would not belong merely to the Rector of Lincoln College, but to the rector and scholars also.

That there was no instance of a benefice, which before the Reformation had been made over to any College or lay corporation, in which, whatever the terms of the appropriation might be, any cure could now be held *ad nutum Rectoris*. That perpetual curacies, as well as curacies augmented by Queen Anne's bounty, required the licence of the Bishop.

That no authority could be shewn for the removal of a parish priest, at the will of the patron from a parochial church which had the rights of

sepulture and baptism; and that it was so laid down in the Attorney-General *v.* Brereton. (a)

Lastly, that this was an attempt to try a civil right in a criminal form.

*Lushington contra.*

From the time of King Edward the Fourth, the Chaplain of Long Coombe has been appointed by the Rector of Lincoln College without licence or constitution from the ordinary; the Bishop has, by omitting to interfere, divested himself of any power of licensing and instituting or examining the competency of the clerk appointed to this cure.

The case of the Attorney-General *v.* Brereton merely goes to this that a perpetual curate is not removeable at the pleasure of the person who appointed him;—here the jurisdiction not being in the Bishop, must be considered as peculiar.

The forms of practice in the Ecclesiastical Court render it absolutely necessary that a case of this description should be put in the shape of a criminal proceeding.

*Per Curiam,*

I am not aware that any clergyman of the established church can perform duty without a licence from the Bishop: the rector of every parish may appoint a curate, but that curate must be licenced by the Diocesan. I know there are instances where curates do not apply for a licence: but they ought to do so.

I see nothing in any of the words referred to

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(a) 2 Ves. Sen., p. 424.

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which takes away the episcopal jurisdiction ; and I have exceedingly strong doubts whether this place can be considered to have been erected into a peculiar jurisdiction exempt from the ordinary of the diocese. Unless that can be made out, I cannot entertain this cause.

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Suit dismissed.

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## PREROGATIVE COURT OF CANTERBURY.

1821.  
*Trinity*  
*Term.*  
 July 11.

JACKSON AND WALLINGTON v. WHITEHEAD.

**ANN WHITEHEAD** died on the 19th of Jan. 1821, leaving a will in which the Rev. Thomas Jackson and Algernon Wallington were nominated executors. On the 1st of February following Mr. Jackson and Mr. Wallington took the usual oaths, as executors: but before the probate passed the seal a caveat was entered; and on the 16th of Feb. an appearance was given for John Whitehead, a nephew and one of the next of kin of the deceased, who instituted proceedings to contest the validity of the will. On the 1st of March the executors were sworn to an affidavit of scripts; and shortly afterwards Mr. Wallington signified his intention of renouncing the probate and execution of the will, and releasing a legacy bequeathed by it, in order that he might become a witness in the cause. (a)

An executor, who had taken the oath of office and given an appearance;—a suit touching the validity of the will allowed to be dismissed, in order that he may renounce probate, and become a witness in the cause.

## JUDGMENT.

Sir JOHN NICHOLL.

The executors were sworn, and the probate was afterwards stopped by a caveat; after that, an appearance was given for the executors, and after that an application was made to dismiss one of the

(a) It was contended that having taken the oath of office, and given an appearance in the cause, it was not competent to the executor now to renounce the probate and execution of the will.

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executors, in order that he might be examined. He is stated to be a material witness in the cause, as he received instructions from the deceased for the making of the will, and was present at the execution of it.

It is not to be denied, that in a great variety of cases, executors have been dismissed after proceedings have been had: but it is said that he has appeared in the cause as a party, and also been sworn as an executor; and these circumstances are considered as precluding him.

I have looked through a great variety of cases, and have not found any one in which the circumstance of a person having been sworn as an executor has ever been that on which the Court has refused to allow him to renounce, nor has it ever been made a material ground.

The only authority in any point is that in *Ventris*. (b) We well know that a single case connected with proceedings in this Court, reported so incorrectly as it seems to be, cannot be safely relied

(b) A mandamus was prayed to the Ecclesiastical Court to grant the probate of a will, under seal, &c.

The case was:—the executor named in the will had taken the usual oath, and then refused, (but after a caveat entered) and another endeavoured to obtain, letters of administration. The executor afterwards came to desire the will under probate, and contested the granting of administration, which was adjudged against him, supposing that he was bound by his refusal.

And after an appeal to the Delegates this mandamus was prayed, and granted by the Court; for having taken the oath, he could not be admitted to refuse, and the Ecclesiastical Court had no further authority, and the caveat did not alter the case.

Note. The oath was taken before a surrogate, yet it was all one. 1 Vent. 335.



upon ; and at most it only decides that a voluntary renunciation is not so binding as to exclude an executor from the duties of the executorship. Another question is, whether, if he be dismissed, his evidence could be received. After looking through a great number of cases, I find none where the Court has refused to dismiss, except on the ground of the party having intermeddled with the effects. The reason for this is obvious—that where a party has intermeddled,—he has taken upon himself the burthen, and acquired the responsibility of an executor,—that was the principle of the decision in *Haywood v. Bridges*.(c)

I think if he has not taken upon himself this burthen, the Court has authority to dismiss him. No injury can be derived to the adverse party from the want of his answers, because he may be cross-examined ;—his knowledge of the transaction may be sifted to the uttermost. On the other hand, a great injury might accrue to the other parties, who may be legatees, if this evidence be excluded.—Innocent third parties may lose the whole benefit of their legacies ; and the intention of the deceased may be defeated because the executor, before he knew of the caveat, had taken the oath of office. This would be great injury and injustice :—and finding no ground on which an executor has been excluded from renouncing, except that of having intermeddled with the effects,—which is not suggested in this instance, I am of opinion that Mr. Wallington is entitled to be dismissed.

(c) Prerog. 1767.

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## CONSISTORY COURT OF LONDON.

1821.  
*Trinity*  
*Term.*  
July 13.

DIDDEAR, falsely called FAWCIT, otherwise SAVILL  
v. FAUCIT.

Nullity of  
marriage by  
reason of false  
publication of  
banns, not  
established.

**HARRIOT ELIZABETH DIDDEAR** was born in July, 1789. In September, 1805, being resident with her parents at Margate, and employed as an actress in the company belonging to the Dover Theatre, she was married by banns in the parish church of St. George, Southwark, to John Faucit, an actor in the same company with herself. This marriage was clandestinely solemnized, without the knowledge of her father and mother, and in defiance of their repeated prohibitions. In the publication of banns, one of her Christian names, that of Elizabeth, was omitted, and the man was married by the name of Faucit, whereas his real name was stated to be Savill.

In Easter Term, 1821, a suit was instituted by the wife to annul this marriage, on account of the undue publication of banns.

It was in evidence that after the marriage Mrs. Faucit had informed her parents that "Mr. Faucit's real name was Savill, though for some family reasons he used the name of Faucit."

As an actor he passed at the time by the name of Faucit.

*Lushington and Dodson for the nullity.*

*Phillimore and Addams contrà.*

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JUDGMENT.

Sir WILLIAM SCOTT.

This case certainly comes before the Court at a time and under circumstances which do not induce what may be called legal favor. It is the doctrine of all courts that every thing is to be presumed in favor of a matrimonial union which has produced children, and united parties by a long cohabitation; such an union is not to be dissolved unless by some pressing obligations of law.

The marriage is of sixteen years standing; and though it was not approved of in its origin, it has had all the confirmation it could receive from intimacy with the family. The father kept up a friendly intercourse with the husband for a considerable time afterwards;—the marriage has produced children, whose legitimacy is to be affected by this proceeding.

There are three or four circumstances I may lay out of the case. The want of consent to a marriage by banns, is of no consequence;—nor is the non-residence in the parish,—as the law has provided that the domicil shall not be looked into.

It is attempted to be set aside on the ground of a false name;—for, as to the interposition of the name of Elizabeth, (which has hardly been made matter of observation) it has been justly denomi-

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nated a slight deviation, unless it had been attended by circumstances more indicative of fraud.

The objection is, that he was called Saville in the banns, whereas the name he was known by was Faucit. The act of Parliament requires the true name :—the native name is *primâ facie* the true name ; at the same time the Court has thrown out that it is possible that a person may have assumed another name, so as to bring it within the description required by the statute. It is possible such a name may supersede the original native name.

In this case it is not very distinctly established what was the true name, and what the putative name. It is said to be the practice, and I believe it is, for actors to assume names, by which they designate themselves ;—it is said he went by the name of Faucit ;—this does not satisfy me that Faucit was the name by which he was universally known. Nothing points to Saville but his declaration that it was his name,—but that declaration was made at a time when he did not intend to commit a fraud. The publication took place in a populous parish, at a great distance from these obscure persons (for such they were ;) it is not likely there should be fraud in the use of it ; and where there is no fraud, the Court is less disposed to pay attention to this sort of variation.

I am not satisfied with this as sufficient to lead to the conclusion that this was an invalid marriage ; —there was no intention of imposing a false name, —no intention of deceiving the congregation. I

suppose he was known by no name whatever. The observation that if he had meant to deceive he would have practised on the other name is, I think, well founded ;—that was not disguised, except by the omission of the name of Elizabeth, by which she was not generally known,—and that was accidental.

Which of the two was the true name of the man does not appear. I cannot pronounce for this nullity.

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July 18.

## PREROGATIVE COURT OF CANTERBURY.

THOMPSON v. WALDRAM.

A party benefited under a former will, which does not appear, cannot be admitted a contradicter to a subsisting will.

### JUDGMENT.

SIR JOHN NICHOLL.

The deceased is stated to have made two wills ; and that Mr. Thompson was executor under one, and Mr. Nias under the other. The former will is not found : but it is alleged to have been in existence, and the executor producing a draft of it, prays to be admitted a contradicter to the latter will without propounding the first.

The will not being forthcoming, the presumption is that it was destroyed by the deceased ;—and a party under a former destroyed will is not at liberty to put a party on proof of a latter will, without offering an admissible allegation ; if he denies the existence of the former will, the executor is bound to go on *pari passu*.

What are the circumstances brought forward in this affidavit ? He has heard and believes the will was destroyed after the death of the testator ; not a word by whom or when.—On a further affidavit by

Mr. Nias, he says, he has heard it was in the possession of the deceased uncanceled and unrevoked, (if twenty witnesses were to state this it would be no evidence of the fact,) and that she deposited it with the plate and other articles in a certain box in her bedchamber.—*Non constat*, that he was told all this by Mr. Thompson: and if all this was reduced into an allegation, the Court could not receive it. I think this affidavit does not propound a statement which justifies this proceeding.

On the other hand, there is an affidavit of persons speaking from their own knowledge, which repels all presumption of the will having been destroyed by any one but the deceased; particularly the affidavit of Brett, who was the subscribing witness under both wills.

No ground is laid for this application:—if any person benefited by a former will is to be allowed to put an executor on proof of an existing will, a door would be opened to very vexatious litigation.

I cannot admit this party to be a contradicter.

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## CONSISTORY COURT OF LONDON.

1821.  
*Aug. 8.*

THE MARCHIONESS *v.* THE MARQUIS OF DONEGAL  
*v.* CHICHESTER.

Not competent to a party called upon to see proceedings in a marriage suit, to object to the jurisdiction, on the ground that the party proceeded against has been unduly cited.

**THIS** suit was instituted by the Marquis of Donegal against the Marchioness his wife, for the purpose of trying the validity of their marriage, which had been solemnized by licence in 1795.

A citation under the seal of the Court was issued against the Marchioness of Donegal, by being served on Mr. Blake her Proctor, and by letters missive being left with him. This citation was returned on the second session of Easter Term, 1821, and an appearance was given by Mr. Blake for the Marchioness of Donegal, and a libel prayed. On the third session of Easter Term a libel was given in on behalf of the Marquis, and the Judge, at the petition of the proctor of the Marchioness, and on the notice of counsel, directed a decree to see proceedings in the cause, with the usual intimation, to issue against Arthur Chichester, and



George Chichester the lawful nephews of the Marquis, and against Arthur Chichester, Esq. (now Sir Arthur Chichester, Bart.,) and Edward Chichester, clerk, the next in succession, after the aforesaid Arthur Chichester and George Chichester, to the titles and estates of the said Marquis of Donegal.

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This decree was served upon Arthur Chichester Esq., Sir Arthur Chichester, and the Rev. George Chichester, clerk. The two latter appeared personally in obedience to the decree, and appointed a proctor ; but no appearance was given for Mr. Arthur Chichester the nephew of the Marquis:—the libel was then admitted. The Marchioness of Donegal's proctor confessed the marriage as pleaded, but otherwise contested the suit negatively ; gave in an allegation setting forth the facts on which she relied to establish the validity of the marriage ; and prayed that dame Elizabeth May widow, and Mary Hyde Mundy might be examined *de bene esse*. The Judge upon argument allowed the application for the examination of Lady May, but rejected it as far as regarded Mary Hyde Mundy. On the same day, during the sitting of the Court, Sheppard appeared as proctor for Mr. Arthur Chichester under protest, which he asserted he would be ready to extend by the next Court, and prayed that no examination *de bene esse* might take place in the intermediate time.

The Judge refused to accede to this application for delay, and Lady May was examined *de bene esse* on the Marchioness of Donegal's allegation,

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and on interrogatories administered to her on behalf of the Marquis of Donegal.

The validity of the protest was argued ;—it set forth that Mr. Arthur Chichester was unduly cited to appear in the cause ;—that no precedent could be found upon the records of the Consistory Court or of the Court of Arches, of any person under similar circumstances having either been cited to see proceedings of this description, or having been made a party to such a suit ; and submitted that none of the proceedings had in this cause, nor the definitive sentence if the Judge should proceed to pronounce one, could be in law binding on the party cited : for it was not competent to the said party to have instituted a suit of this description against the Marquis or Marchioness of Donegal, for the purpose of having any marriage had between them declared null and void, when the alleged invalidity of such marriage was a breach of the marriage act. That inasmuch as it was not competent for Mr. Arthur Chichester to institute such a suit for his own advantage, so also he could not have claimed any right to intervene in the said suit for any alleged protection of his own interest, as no proceedings had in this Court between the Marquis and Marchioness of Donegal could be binding on him. The protest then went on to state, that the proceedings carrying on in the suit between the Marquis and Marchioness of Donegal were collusive, and that the object of the suit was by contrivance and management to obtain a decree in favour of a pretended marriage ;—that the marriage took place on

the 8th of August, 1795, in pursuance of a licence procured by the Marquis of Donegal, in which it was stated that Charlotte Anna May was of the age of eighteen years and upwards, and a minor; and that Sir Edward May, Bart. (then Edward May, Esq.) the then reputed father of Charlotte Anna May, calling herself Marchioness of Donegal, had also sworn to the affidavit to lead the licence, and to his consent as lawful father to the said marriage;—that Sir Edward May lived many years after this;—that in 1809 the invalidity of the marriage became matter of public notoriety, in consequence of a marriage being about to take place between George Hamilton Chichester, Esq., calling himself the Earl of Belfast, and the lawful son and heir of the Marquis of Donegal, and a lady of rank; which marriage did not take place in consequence of the invalidity of the alleged marriage between the Marquis of Donegal and Charlotte Anna May, falsely calling herself Marchioness of Donegal;—that though the objections to the marriage were thus public, no steps were taken to try the validity of the same in this or any other Ecclesiastical Court, till the 12th of May, 1821, when the citation was taken out in this cause.

The protest further alleged, that the Marquis and Marchioness of Donegal had not separated, but still continued to live as husband and wife;—that the whole proceedings were irregular and collusive;—that no necessity existed for the examination of witnesses *de bene esse*;—that the witnesses who must depose to the principal facts were resident in Ireland, and some of them entirely under

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the influence and control of the Marquis of Donegal.

In reply to this, it was stated on the part of the Marchioness of Donegal, that it was competent for third parties having an interest, to intervene in all suits of nullity of marriage for the protection of that interest ;—that such parties were liable to, and might be cited to see, proceedings in suits of that description ;—that if no exact precedent occurred of a party cited to see proceedings in a suit of nullity of marriage, where the alleged ground of such nullity was a violation of the provisions of the marriage act; yet that with reference to cases of a similar nature, and the general practice of the Ecclesiastical Courts, and with a view to the administration of substantial justice, the mere absence of such a precedent afforded no sufficient ground why the Judge should hold Mr. Arthur Chichester to be unduly cited. The answer then denied that the proceedings were collusive, or that it was the object of the suit by contrivance and management to obtain a decree in favour of a pretended marriage ; and concluded by stating that the suit had been instituted by the Marquis and defended by the Marchioness, for the purpose of ascertaining the legal state and condition of themselves and their issue ; and alleged that it was essential to the purposes of justice, that the validity of the said marriage should be examined by a Court of competent jurisdiction, during the lifetime of persons capable of giving testimony of material facts respecting the same, some of whom are far advanced in age, and in very precarious health ;—that the Marchioness was de-

sirous that the proceedings and the examination of the witnesses, should be had with the privy and in the presence of Mr. Arthur Chichester, and other persons interested in the marriage, and for that purpose she now prayed the citation which had issued against them.

The reply of the Marquis of Donegal denied all collusion, and alleged that doubts having arisen respecting the validity of the marriage, measures had been taken to try the validity of the same, or questions depending on its validity ;—that accordingly bills in Chancery had been filed to perpetuate the testimony of certain witnesses, by the Earl of Belfast, as tenant in tail of certain estates possessed by the Marquis in England, in November, 1819, 1820, in Ireland, in February, 1820, and 1821 ;—that to such proceeding Mr. Arthur Chichester had been requested to become a party, and had refused so to do ;—and he further alleged, that before the institution of these proceedings, Mr. Arthur Chichester was informed that they would be instituted ;—and that this suit was instituted and carried on for the purpose of trying the validity of the marriage between the parties.

In reply to these statements a rejoinder was given in by Mr. Arthur Chichester, which set forth as evidence of the averment that Charlotte Anna May, falsely calling herself Marchioness of Donegal, had been continually for upwards of four years last past, and still was resident in Ireland ;—that the citation in this cause issued on the 12th of May last, and that on the 14th of the same month the letters missive were shewn by the officer of the Court

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to the proctor of the Marchioness, who undertook to accept the service of them for the Marchioness, and to appear and defend the suit ; and that this citation was returned into Court on the 18th of May, and an appearance was immediately given ;—he further alleged, that in refusing to become a party to the proceedings in the Courts of Chancery in England and Ireland, he had acted under the advice of his counsel in consequence of the said proceedings not being calculated to bring the question at issue fairly before the Court.

Objection was first taken by *Swabey and Lushington* the counsel for Mr. Chichester, to the day on which the question was brought forward ;—the citation was to appear on the court-days and bye-days of the term, whereas this day was neither court-day nor bye-day. To this it was replied, that it was upon an understanding and for general convenience that it was brought on on this day. The Court overruled the objection, and directed the counsel to proceed with their argument.

Swabey and Lushington for Mr. Chichester.

The Marchioness of Donegal was not resident within the jurisdiction, and it was not competent to the court to try the question ; she must be resident within the diocese, according to the statute of Henry 8., (a) and the 106th Canon.

The party cited to see proceedings had no direct or immediate interest in the suit,—he may be consequentially interested, but that is not sufficient ; no one but a party interested in the bond of matri-

(a) 23 Hen. 8. c. 9.

mony can sue in a suit of this description. The marriage is pleaded to be void by the statute;—the interest of Mr. Chichester is merely contingent:—if this marriage should be void, the Marquis of Donegal might marry again and have issue, which would defeat the interest of this party. The suit was merely personal; if either party ever after publication dropped the suit, Mr. Chichester could not oblige them to continue it. On the death of either party the suit would abate. Mr. Chichester could not have intervened in a suit of this description, he cannot therefore be dragged into it.

After the death of either the Marquis or the Marchioness of Donegal new interests might arise, and then the validity of the marriage might be questioned;—but *nemo est hæres viventis*: the question might arise on the grant of an administration: but such suits are not strictly matrimonial;—the Ecclesiastical jurisdiction is different in such suit;—it is of a testamentary character. We deny that there is any precedent;—the Court is to administer the law, not to make it;—analogy is no ground for precedent. In the case relied on *Dalrymple v. Dalrymple*, (b) the question was respecting the vali-

(b) *Dalrymple v. Dalrymple*, Consistory, July 6, 1811. De-leg. 19 Jan. 1814. In the Consistory, the husband and wife were the only parties. On the appeal to the Court of Arches an intervention was given for Laura Manners, describing herself as Laura Dalrymple the wife of John William Henry Dalrymple the appellant. On 18 Nov. 1811, an allegation was asserted on her behalf, and the Judge assigned to hear an admission thereof on the 4th of December. On that day her Proctor prayed the assignation to be continued, which was opposed, and the Judge

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dity of the marriage :—the second wife intervened, she was immediately interested in the bond of matrimony.

So in the case of incestuous marriages, they are voidable only :—a suit would be precluded after the death of either party.

So likewise, citations taken out in testamentary causes are different : those suits are against all the next of kin : there the interest is immediate and direct ; the suit is not personal, but may continue after the death of either of the parties.

In addition to these objections we state collusion, and allege facts in proof of it.

Phillimore and Addams contra.

The construction attempted to be put on the statute of citations, and the 106th Canon is erroneous : they were passed to prevent parties being harassed by vexatious suits, and compelled to join issue in such suits at a distance from their places of residence ; (c) they were for the protection of the parties cited. In the present, the party cited has appeared and admitted the jurisdiction, this is sufficient ; if there had been any defect as to jurisdiction it would have been cured by this appearance.

concluded the cause and assigned it for sentence the next Court day. From this decision an appeal was prosecuted to the High Court of Delegates,—and there an allegation was given on behalf of the intervener, which was opposed and ultimately rejected.

The cause was heard before the Delegates on the merits, on Jan. 19, 1814, and the sentence of the Consistory Court affirmed.

(c) Gibson Cod. 1004, 1008. Hetley 19. 1 Ventris 61. 23 H. 8. c. 9.

It is not competent to Mr. Chichester to take this objection, but to the Marchioness of Donegal alone. If the question were to be gone into, Lady Donegal is sued as a married woman, and her husband's residence is her residence.

In Tenducci's case the citation was not served on the husband (the party proceeded against,) till publication had passed in the cause: the party was abroad during the whole of the proceedings.

In Lord Herbert's case, the party proceeded against had left the diocese within which the suit was instituted four months, but he having appeared and submitted to the jurisdiction, the Court held that this was sufficient to found the jurisdiction.

The cases of incestuous marriages are in principle the same; the Court allows a slight degree of interest sufficient to enable a party to bring a suit to annul them. Dalrymple's case is a recent instance of the introduction of a third party in a marriage suit.

There is no ground for the charge of collusion, the suit is brought to try the validity of the marriage, to ascertain the situation of the parties; and the call is made upon the parties mainly interested in annulling the marriage to be present and see the proceedings;—and surely it is for the interest of all who wish the truth to be ascertained, that the question should be examined and enquired into, while the witnesses who were present at the transaction are alive. Surely also the parties can have no better mode of detecting collusion and fraud, if they really are apprehensive of it, than by bringing all the facts before a Court as accustomed as

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this is to sift and examine questions of this description.

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Addams and Burnaby for the Marquis of Donegal.

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The Court took time to deliberate.

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SIR WILLIAM SCOTT.

In the course of the proceedings in this cause, an objection has been taken to the citation: not that it is ill conceived, but that it has not been executed properly; the objection is taken by the party called upon to see proceedings. The party cited in the cause might object to this; but it is not competent for the party only cited to see proceedings, to do so; and if it had been, my opinion is, that the defect in the citation, if any, would have been cured by the appearance of the party. The stream of authorities flows in favour of this conclusion.

The citation seems to me sufficient. I overrule the objection to the jurisdiction: but I decide nothing as to the liability of Mr. Chichester to be called upon to see proceedings.

VICE CHANCELLOR'S COURT.

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DONEGAL v. DONEGAL.

In Chancery.

APPLICATION was made to the Lord Chancellor by Mr. Arthur Chichester, for a writ of prohibition against the Judge of the Consistory Court of London; and the question was argued at great length before his Honour the Vice Chancellor.

Mr. Wetherell, Dr. Lushington, and Dr. Dodson, were heard in support of the prohibition.

Dr. Phillimore, Dr. Addams, and Mr. Sugden, contra.

Mr. Bell appeared for the Marquis of Donegal, but did not address the Court.

JUDGMENT.

THE VICE CHANCELLOR.

This is an application made to this Court by Mr. Arthur Chichester, praying that a writ of prohibition may issue directed to the Judge of the Consis-

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torial Court of London, to restrain the Marquis of Donegal from proceeding in a suit instituted by him against the Marchioness of Donegal, for a sentence of nullity of marriage.

Now that this question is of great importance, not merely to the parties in this suit, but as a question that generally affects the practice and proceedings of the Court, must undoubtedly be admitted; and that it is a question therefore that requires very due deliberation, must be undoubtedly admitted also. I am nevertheless disposed to state my opinion on the subject now. First, because it appears that the main purpose of the suit is to acquire the testimony of witnesses, who are represented to be so aged and infirm, that the loss of every day must be of the most material importance to the parties. Next, because this case has been so ably and so fully argued, that it must be the fault of the Judge if he does not now take the correct view of the subject. And, lastly, because the result of the elaborate arguments which have been so properly addressed to the Court, have induced me to think, with a considerable degree of confidence, that the real question in this cause lies in a very narrow compass indeed, and which I think may be embraced without further delay.

In the month of May last, the Marquis of Donegal applies to the proper officer of the Consistorial Court of the Bishop of London, to issue a writ of citation against the Marchioness of Donegal, and that writ of citation lies before me; and it there describes the Marchioness of Donegal as resident in the parish of St. James, Westminster, and it

calls on her to answer to the suit of the Marquis of Donegal for a sentence of nullity of marriage.

Now, if upon the face of this citation, it had been represented that the Marchioness of Donegal was resident in Ireland, and out of the jurisdiction of this Consistorial Court; then it would have been perfectly clear as a settled and sound principle, that whatever this Court might have done in the suit, it might at any time, and after any sentence, have been reversed, in respect of the want of jurisdiction apparent on the face of the record: but on the face of this citation there is no difficulty whatever. The fact stated there is, that the Marchioness of Donegal is resident within the parish of St. James, Westminster, and therefore consequently is within the jurisdiction of the Court. To this citation the Marchioness appears, I think upon the 16th of May, two days after the citation issues; and she not only appears to the suit, but she pleads to the suit; and she states the nature of her case and the nature of the evidence by which she endeavours to maintain her case, namely, that she is the lawful wife of the Marquis of Donegal: by this appearance therefore, and by thus pleading what the nature of her case is, she does in fact admit that she is resident within the parish of St. James, Westminster: that she was not resident was within her own knowledge; it was a fact within her own knowledge, and she does not take advantage of that misdescription; and by taking no notice of it, and appearing, she admits that she is properly described as being resident within the parish of St. James, and consequently therefore within the local jurisdiction of the Court.

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After she has so appeared and pleaded, she is instructed by her legal advisers, that this suit does not effectually determine a question so important to herself and children : as between her husband and herself it would determine the question : but the family estates and the family dignities will, if there be no legal issue of this marriage, descend to Mr. Arthur Chichester ; and taking therefore the fact of the libel to be a fact of great importance to be tried, it was her interest to try it, not merely with her husband, but with that gentleman who might afterwards dispute it with her and her issue ; as he claimed in respect of this being no valid marriage, and as the heir to the estates of this family. She was instructed according to the form of proceeding in the Ecclesiastical Court, that she had a right to call him before that Court, for the purpose of trying it as a question, which involved in it a question, to which he was a party interested ; and that as a party so interested he was to come before the Court ; and under those instructions, which must be taken to be correct in point of law, whether the point of fact does depend on Mr. Arthur Chichester's interest or not,—she does issue a citation, calling on Mr. Arthur Chichester to appear to the suit, in order that she may against him as well as against her husband, establish the important fact of her marriage. Mr. Arthur Chichester on receiving this, appears : but he appears under protest ; and he alleges by his protest,—first, that he has no such interest in the question as ought to induce the Marchioness of Donegal to summon him as a party to the suit ; and he next states that this is a collusive suit,

and that for this reason he ought not to be made a party to it. An answer, as it is called, is put in to his protest, and in that answer it is alleged,—first, that he is a party, and that he ought to be a party, and that he has such an interest in the subject, which makes it fit that he should be cited in this suit. And next it is alleged, that no collusion existed between these parties, or took place between the parties : but that the suit is instituted for the purpose of fairly trying the question at issue between them.(a)

Mr. Arthur Chichester replies to that answer, and in his reply he introduces these facts ; first, he says, in the answer given to my protest, it is alleged

(a) In the course of the argument, the following observations fell from the learned Judge, with respect to the charge of collusion, which had been advanced, against Lady Donegal.

“ It has been stated at the bar, that this is a case in which there has been a great deal of fraud and collusion. I think it is my duty to say, that no question of collusion or fraud is before me ; and that there is no evidence before me that amounts to a charge of collusion,—there is evidence of concert and agreement: but it may be concert and agreement, as has been very properly stated, between the parties, for the purpose of having the questions, which are so important to the interests of this family, properly tried, by a proper tribunal. It might on the other hand, be a concert and agreement to impose on a Court of Justice false facts with a view to mislead the Court, which would be contrary to the truth and justice of the case ; but if that was their object, it seems to me quite impossible that they should have instituted these proceedings in one of the highest tribunals in the country, and call before that tribunal a party who has the strongest interest against the judgment which they wish to obtain;—these are the facts which appear to me extremely strong against any inference of collusion.”

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that there is no collusion : now in point of fact the Marchioness of Donegal was resident in Ireland at the time of the institution of this suit, and had been so resident in Ireland for four years ; and this citation to her was on the 14th of May, and she is made to appear on the 16th of May ; and therefore, without collusion, it is impossible that a party resident in Ireland could appear in London in a suit only instituted two days before.

The general case came on in proper form, to be argued before the Judge of the Consistorial Court ; and it appears however, without entering into the general view of the argument, as to whether Mr. Chichester was properly cited with respect to his interest, there was a point, which if decided according to his allegation, would make all further consideration of his unnecessary, namely, a point arising out of his allegation—that the Marchioness of Donegal at the time that this suit was instituted was resident out of the jurisdiction of the Court :—though it is and must be admitted, that it was not very regularly pleaded with a view to raise that point ;—and although it must be seen by reading the papers, that it was rather introduced as an argument to shew collusion between the parties, than as a substantive fact on which the parties relied, with a view to the principal question. Yet still it was considered to meet the general convenience of the parties in this suit, that all informality as to the form of the pleadings in fact should be waved, and that they should be taken as regularly pleaded, for the purpose of enabling the Judge to determine whe-

ther it did constitute an objection which would prevent all further prosecution of this suit.

The learned Judge in exercising his judgment on the question, has decided that it did form no objection to the further prosecution of this suit, and to that decision Mr. Arthur Chichester has lodged an appeal,—an appeal to the next superior Court to the Consistorial Court of the Bishop of London.

I cannot enter into any consideration, whether the learned Judge did, more or less, deliberately consider the subject: but the learned Judge has pronounced a judgment on it; and although in all cases the authority of the learned Judge who pronounces a judgment, ought to weigh considerably; yet I am rather to trust to my own imperfect view of the subject treated before me, as it has been, on reasoning and upon general principle, than on the weight of any authority whatever: though if any authority could influence me against the effect of my own views, certainly no higher authority could be stated than that of the learned Judge who has made this decision.

The first question stated was, that Lady Donegal herself, notwithstanding the steps she had taken in the suit, was still at liberty to allege the want of jurisdiction in the Court. And that if she was at liberty to allege the want of jurisdiction of the Court, of necessity it was supposed to follow that Mr. Arthur Chichester would be at liberty to allege that want of jurisdiction; and it was further stated, and stated I believe principally from the Court it-

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self, that although it might turn out in the examination of authorities and principles, that Lady Donegal herself was no longer at liberty to state an objection to the jurisdiction of the Court; that it did not therefore necessarily follow that Mr. Arthur Chichester might not still be at liberty to take that objection: but it would be a very serious and a very important question how far any submission to the suit, or any admission on her part of the facts stated in that suit, could conclude the rights of Mr. Arthur Chichester, who was not only an intervening party, but an intervening party against his consent.

Now the first and most important question is, whether Lady Donegal would be now precluded if she thought fit, from taking an objection to the question of jurisdiction. The question of jurisdiction is of two sorts, the want of jurisdiction as to the subject of the suit, which never can be acquired, and the want of jurisdiction as to the locality of the parties in the suit:—it is material to see what steps are had in the inferior Court. If it appears on the record that the inferior Court had never any jurisdiction on the subject, there is no proceeding in this Court, and no acquiescence of parties ever can maintain the judgment.

But the want of jurisdiction may proceed, not from the nature of the subject, but because one of the parties is not locally within the jurisdiction of the special Court; and although the Court then may have full jurisdiction of the subject, it has not jurisdiction over the party, in respect of the ab-

sence of that party from the local district. That is the nature of this objection ; it being admitted here, that on the subject itself the Court itself has full jurisdiction. And as to the question of the marriage between Lord and Lady Donegal, there is no objection : but the objection to the question being, that at the institution of the suit, Lady Donegal was not locally within the district, and therefore not properly before the Court.

It appears to me that it hardly admits of a question, that a Court of limited jurisdiction, (I mean limited as an ordinary court is, perhaps to an archdeaconry, or a bishopric, or an archbishopric) and it is hardly necessary to observe on the plainest principle of the common law, that on a mere assertion of interest, such a Court can never have jurisdiction beyond its own local limits.

I conceive that it is not the statute of the 23d of Henry the 8th, that created this objection : the objection is inherent in the nature of a limited jurisdiction.

The 23d of Henry the 8th, seems to me to have had in view only to enforce the principle of the common law, by imposing a penalty and forfeiture against those who should act against its principles. It seems by the recital of the statute itself, that it had become necessary, in respect of the practice which had been adopted by the archbishop and others, and so the recital seems to import, in drawing within their superior jurisdiction persons who were not locally resident there.

I take that statute to be merely affirmative of the general principle of the common law, and to give aid

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to that principle of the common law by the enforcement of the penalty and the forfeiture. The Canon law considers it in the same way, and considers it as declaring the principle of the common law; and it declares,—namely, that he who in respect of an office, which has a limit and local extent as to judicial jurisdiction, is necessarily by the principle of the common law limited in that jurisdiction, according to the extent and locality of his office.

Therefore not placing any great value on any observation that arises out of the statute, but considering it as a general principle, I shall proceed to state the facts of the case.

Now that Lady Donegal might if she pleased, when this citation was served on her,—that she might have appeared without waving her objection to the jurisdiction, is plain: because although there are not the same terms of pleading in the Ecclesiastical Court as there are in the Courts of law, yet the principle to some extent must prevail; and this party therefore must appear for the very purpose, or rather may appear, (whether they must appear is a proper phrase, I do not stop to enquire) but a party may appear without waving an objection to the jurisdiction is quite certain, because she may appear as Mr. Chichester has done, under the protest with respect to that jurisdiction.

Lady Donegal might therefore if she had pleased, have taken the objection when she was served with a summons, in which it was represented that she was resident in the parish of St. James, Westminster, as it seems now that she was not. She might

have stated, "that this suit is most improperly instituted against me in the Consistorial Court in London, I am not resident within the district of that Court, it is very true your citation alleges that I am locally so resident—that is not the fact:—I protest against your jurisdiction, being a person not resident in the parish of St. James, Westminster; but being a person resident within the kingdom of Ireland—at Dublin, or elsewhere."

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Lady Donegal however, does not think fit to take that objection; the objection is before her, when she appears, not for the purpose of stating the objection, but she appears for the purpose of proceeding with the case, and entering into the merits of the suit; and it is in fact an admission on her part that she is properly described as being resident within the parish of St. James, Westminster, and is within the jurisdiction of this Court in which the plaintiff desires to entertain the question.

Now it is said, notwithstanding this admission on her part of a fact, it then must be considered what the nature of the admission is, it is an admission by her of a fact which brings the case within the jurisdiction. It is said notwithstanding, that she admits the fact which gives the Court jurisdiction: although she proceeds to the length not only of pleading and submitting her case to the consideration of the Court; yet she has a right to retire from that admission at any time before sentence pronounced; and that Lady Donegal in this case is not concluded, because sentence on the merits of the case not being pronounced, still she has a right to retire from the suit.

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If I had found that question concluded by authorities, whatever I might have thought of the reasons which had led to that conclusion, I must have been bound by them.

There is nothing so dangerous to the administration of justice as, because the principle of the authority does not appear to be present to the mind at the moment, which induced the judge who decided that question to decide it in that manner, to go against it, and therefore it is always dangerous to disregard authorities. I am bound to say that no authority which has been cited to me to day, at all as I consider it, touches essentially this question; that Lady Donegal or any other party, who, admitting the fact which gives the jurisdiction to the Court, has a right to retire from an admission of that fact at any time before sentence.

No authority appears to me to go that length; there are expressions in that case in *Carthew*, (a) which would be consistent with such a statement of facts: but when you come to weigh the weight of all the expressions there used, my opinion is on that case that the weight of authority is the other way, and that what the Court there means to decide, is not that a party may retire at any time before sentence, but that a party can never retire who has pleaded and submitted to the jurisdiction. Taking this therefore as a question not prejudiced by authority, I am to consider it as a case standing on principle only. Now my learned friends whom I see around me, know in a Court of law and also in a Court of equity, that though we have not precisely that point addressed to our consideration, yet every day we

(a) *Carthew*. 33.

have the point upon which necessarily the same principle comes to be decided. I state without exception, as a general principle, that in Courts of equity as well as Courts of law, a party admitting a fact which does give jurisdiction to a Court, admitting it, and appearing and submitting to that jurisdiction upon general principles, and upon all analogies known to us, can never recede, or as it is called in the Scotch law, resile from those facts and withdraw that admission.

My opinion therefore is, that Lady Donegal is conclusively bound from any objection as to the want of jurisdiction, by the course she has taken in this cause. If therefore the right of Mr. Arthur Chichester to object to the question of jurisdiction is to depend upon the right of Lady Donegal, it will necessarily follow to be my opinion, that as Lady Donegal is concluded from the objection, so Mr. Arthur Chichester must be concluded equally from the objection.

But then it comes to be considered this very important question ;—namely, because Lady Donegal has concluded herself, has she therefore concluded Mr. Arthur Chichester, the intervening party? Now at first sight this objection appeared to me to be of very great weight ; and it appeared to me to be of great weight for this reason :—Lady Donegal, like any other party, may admit if she pleases facts against her own interest, and by that admission may transfer the jurisdiction from a Court to which it does not correctly and legally belong ; she may certainly, if she pleases, do that. The provisions of the law are

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made with a view for her benefit, and it is for the benefit of the suitors, out of the jurisdiction, that the law prevents inferior Courts from exercising that jurisdiction beyond its own limits,—that persons may not be harassed by being called to contest questions out of the limits of their own local residence.

If a party therefore thinks fit to remove this advantage which the principle of the law, the canon law, the common law, and the statute law give her, she is at liberty to do so. But then if she chooses on her part to remove that advantage, can that prejudice the rights of a third person?

It did therefore at first strike me to be very important to consider, whether Lady Donegal's having waved this objection for herself, Mr. Arthur Chichester, a third person, could be prejudiced from that objection, or her waver.

Now if it could be made out, that Mr. Arthur Chichester could be prejudiced by her waving that objection, the conclusion that first struck my mind would necessarily follow: for it is utterly impossible that her acts could work an injury to third persons, if she thinks fit to wave a benefit which the Court gave her, and that that hurts a third person;—that cannot be.

When we come to consider the subject, the difficulty is to understand how the waver on her part can in any manner injure Mr. Arthur Chichester. If I could fancy any possible case in which the interest of Mr. Arthur Chichester would be prejudiced by this question being tried within the local jurisdiction of London, rather than the local juris-

diction where this Lady was resident in Ireland, that would go a great way to determine my opinion in this case.

It is however because I cannot conceive, on principle, any prejudice which can arise to Mr. Arthur Chichester from this objection ; and therefore it does appear to me, on the best consideration which I can give the subject, that Mr. Arthur Chichester, as the intervening party, cannot relieve himself from that objection.

The jurisdiction of the Ecclesiastical Courts does not depend on the locality of the subject ; and if the jurisdiction of the Ecclesiastical Courts depended on the locality of the subject, then it is very plain that a party might be materially prejudiced from having a subject removed from one jurisdiction to another ; and it would be infinitely more convenient to a party with respect to the nature of the case, and the testimony he could bring on the case, that the suit would be instituted in the diocese of A. rather than in the diocese of B.

If therefore Lady Donegal, in such a case, transferred the jurisdiction from the diocese of A., where the Court had local jurisdiction in respect of the nature of the subject, to B., I should be clearly of opinion that the intervening party could not be affected by her acts. It is perfectly plain, that the Ecclesiastical Court has not jurisdiction with respect to the *locality of the subject*, but it depends entirely on the *locality of the person*.

Now if it depends entirely upon the locality of the person, I am to ask myself, whether Mr. Arthur Chichester can be prejudiced in respect of this case,

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if this question is to be tried in London rather than to be tried in Ireland,—whether he can possibly be prejudiced by this being tried where he is himself locally resident, within the jurisdiction, or otherwise, the objection would be on him and he would not have to state that this suit is not to proceed because Lady Donegal is out of the jurisdiction: but that this suit is not to proceed, because I am out of the jurisdiction,—I am an intervening party, and I have a right to be heard by my interest in this suit, which in the result may materially prejudice me: and it must be tried where I am locally resident, and within that jurisdiction of the subject. But Mr. Arthur Chichester is within the jurisdiction of the diocese, and therefore that objection does not apply to him: it being, as I have stated, a case in which the jurisdiction depends, not on the subject, but on the locality of the person. So far from being an inconvenience to Mr. Arthur Chichester that this suit is instituted here, where he is locally resident; it may be convenient to him rather than that it should be elsewhere tried, if it could be elsewhere tried, where he was not locally resident.

It is therefore without entering further into the considerations which have been addressed to me on this subject,—and confining my present view to the two present points;—I have to declare, that neither on authority or upon principle, can I hold that Lady Donegal is now at liberty to withdraw that admission of the fact on which the jurisdiction of the Court is founded. And I am further of opinion that Mr. Arthur Chichester, the intervening party, is bound by this admission to that jurisdiction, and that

he cannot be prejudiced by submission to it; and if his interests are in any manner affected, it is to his convenience and advantage, and not to his prejudice. It is therefore conformably to that view of the case, that I understood that the quotations from Godolphin, Gale, and other writers applied; the citation founds itself, and he cannot make an objection to the jurisdiction, if the parties litigant have submitted to that jurisdiction.

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Writ of Prohibition refused.

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PREROGATIVE COURT OF CANTERBURY.

FORBES v. GORDON.

Imperfect
papers esta-
blished as co-
dicils to a re-
gularly exe-
cuted will.

AN allegation was given in on the part of Charles Forbes Esq., the executor under the last will and testament of his uncle John Forbes, Esq. of New, in the county of Aberdeen, and of Fitzroy Square, in the county of Middlesex, which pleaded the following facts:—

First, That John Forbes, Esq. the testator in this cause deceased, having on the 2d of May, 1820, made and duly executed his last will and testament in writing, did immediately after the execution thereof enquire of his solicitor, Mr. Julius Hutchinson, by whom the will had been prepared, whether any particular form of words would be requisite for the purpose of bequeathing legacies to relatives or friends:—and upon being answered in the negative, so far as regarded absolute pecuniary bequests, he the said deceased then expressed his intention to make himself, at a future time, a codicil

containing bequests of that description. And that on or about the twelfth day of June, 1821, the said John Forbes called upon the said Julius Hutchinson, at his chambers in Lincoln's-Inn, and delivered to him his aforesaid will, bearing date the second day of May, 1820, together with a paper writing being the testamentary paper or codicil now marked with the letter B. ; and he then mentioned to his said solicitor, that he wished a new will to be prepared with such alterations to be made therein as were pointed out in the said paper writing marked B. And the said Julius Hutchinson, having read over the said paper of instructions, in the presence of the said deceased, and observing that several of the alterations therein suggested would not be requisite, as the events and circumstances to which they referred were already provided for by his said will ; he thereupon informed the said deceased that a codicil embracing the remainder of the wished for alterations would be sufficient. That the said Julius Hutchinson further observing, that by the said paper writing marked B., the bequest of the residuary estate as contained in the will was intended to be revoked, and not conceiving that complete instructions were contained in the said paper writing for disposing of the same anew ;—he asked the said deceased in what manner he wished the undisposed of residue to go ;—to which the said deceased replied, that “ he meant it to go to his executors,” adding, that he supposed that would be the effect of the expressions used by him in the said paper of instructions : for that having bequeathed the residue to his executors, they

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would take the excess beyond what might be specifically bequeathed, or he the said deceased expressed himself in words to that or the like effect: but the said Julius Hutchinson did not commit the said deceased's explanation, in that behalf, to writing.

Secondly, That the whole body, series, and contents of the said paper, writing, or codicil, marked B., beginning and ending as is hereinbefore set forth, pleaded, and referred to in the next preceding article, were and are of the proper handwriting of the said John Forbes the deceased in this cause.

Thirdly, That the deceased at the time of his delivering the aforesaid paper of instructions marked B., to the said Julius Hutchinson, as before pleaded, was apparently in good health; and having treated the subject as a matter to be attended to at his, the said Julius Hutchinson's, leisure, who had at that time occasion to go to the Continent upon particular business, the preparation of the said intended codicil was postponed by him as a business which might await his return; previously to which the said deceased died suddenly, as hereinafter pleaded. That at the time of the said deceased's death, the said original will and paper of instructions remained in the custody of the said Julius Hutchinson, for the purpose of his preparing a codicil, agreeably to the directions therein set forth.

Fourthly, That the deceased, who was at the age of seventy-eight years or thereabouts, was taken suddenly ill at his house in Fitzroy Square aforesaid, between nine and ten o'clock in the evening of the 20th day of June now last past, and died be-

fore the following morning; and on or about the thirtieth day of the said month of June, a search being made amongst his papers, the aforesaid testamentary paper or codicil marked A., beginning thus, "London, March 1st, 1821:" ending thus, "To the widow of my late nephew Thomas Forbes, I leave five hundred pounds," and subscribed by the said deceased on the three first pages thereof, was found in the left side of a writing table or desk in the dining room of the said deceased's house in Fitzroy Square, at which he usually wrote, and in which he kept his cash book and papers of value. That James Mindenhall, the butler of the said deceased, was in the habit of frequently going into his master's room to see whether he wanted any thing; and did on the forenoon of the day of the said deceased's death, on entering the said dining room, observe the said deceased sitting at the aforesaid table or desk employed in writing, that he went near enough to the said deceased to see that he had before him a paper written almost all over, of the size of a sheet of foolscap paper:—and that it was folded in the manner such paper usually is when written upon book-ways;—and the said deceased on being so interrupted, did in the presence of the said James Mindenhall fold up the said paper, and put it into the left side of the said table or desk. And the party proponent doth allege and propound, that when the said desk was searched as aforesaid, after the said deceased's death there was not any paper found therein which answered the description of that upon which the said James Mindenhall so saw the said deceased en-

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gaged in writing, except the aforesaid paper writing now marked A., pleaded and propounded in this cause, as a codicil to the will of the said deceased.

Fifthly, That the body, series, and contents of the paper writing marked A. was in the handwriting of the deceased.

The following are copies of the testamentary papers propounded in this allegation.

A.

London, March 1st, 1821.

In the case of my inability to make a regular codicil to my will made and published on the second day of May, 1820, I desire the following to be taken as a codicil to, and as a further part of my said will.

I revoke that part of my will, wherein I bequeath in the ninth page thereof the residue of my personal estate to and among my grand nieces that may be living at the time of my death, and in lieu thereof, I will and bequeath to my grand nieces the sums that may fall into the residue on the death of such of my nieces as may die or depart this life without issue them surviving, to be paid to and divided among such of my grand nieces as may be in life at the death of every such niece respectively.

I desire my executors to give up to my tenants in Aberdeenshire the full half year's rent they may have to pay at the first term of Martinmas or Whitsunday, after my decease.

As the ship Bombay is now on the last of her chartered voyages, my object in retaining an interest in her no longer exists, except in the event of her being chartered again on reasonable terms by the Company, in which case I should be willing to make some sacrifice to get John Shepherd a command.

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In case of the death of my cousin, the Reverend Thomas Gordon, and of my cousin the Reverend Robert Shepherd of Daviot, before me, I desire that the sum left to each of them by my will, may be divided equally among and between the widow and daughters of each.

I am the sole trustee to the marriage articles of Daniel Ross of Calcutta, with his late wife Elizabeth Forbes, its amount is 838*l.* 10*s.* 1*d.* in the consols, standing in the names of John Forbes, Charles and Michie Forbes, the husband has the interest during his life, and on his death it is to be divided among a large family.

I bequeath to my executors in trust five thousand pounds to be by them applied as donations to five of the hospitals supported by voluntary contributions, situate at or near the most public entrances into London, that admit of casualties at all hours of the day or night. I leave two thousand pounds to my executors in trust, for the purpose of building a bridge over the river Don, in Strathden, the situation to be chosen by them.

I bequeath the following legacies :—To Joseph Cotton, Esquire, of the Trinity House,

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three thousand pounds ; Major Daniel Mitchell, one thousand pounds ; Mrs. Dorothy Morley, two thousand pounds ; Miss Harriet Morley, one thousand pounds ; Miss Caroline S. Patrick, one thousand pounds ; to Lady Grant, the widow of the last Sir Archibald Grant, of Monymusk, I leave one thousand pounds ; and to her five daughters, I bequeath to each of them five hundred pounds ; to each of the three daughters of the late Mrs. Grant of Drununnor, I bequeath five hundred pounds. To my remaining co-temporaries, John Forbes the comptroller-general, Gordon Forbes, and James Forbes of Seaton, I beg their acceptance of one hundred guineas for a ring each. To my old India friends, Edward Ravenscroft, Edward Russell Howe, James Smith, Thomas Wilkinson, William Page, John Morris, David Inglis, George Simson, Generals La Macquarrie and Benjamin Gordon, Alexander Gray, Paul Shewcroft, and Robert Henshaw, I request that each of them will accept of one hundred guineas as a mark of my regard. To my friend Alexander Tulloh, I leave one hundred guineas as a token of regard.

I leave my coachman and butler two hundred pounds each, over and above what they will be entitled to by my will.

I recommend Alexander Gray to be retained at a salary, to assist my executors in winding up my estate.

To William E. Montgomerie, son of my former commander Alexander Montgomerie,

Esq., of Annech Lodge, I bequeath five thousand pounds, for the esteem I bore his father, and the obligations I have been under to him.

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I desire my executors to pay in five hundred pounds to the Middlesex hospital, as a donation from me.

To the widow of my late nephew (a) Thomas Forbes, I leave five hundred pounds.

B.

Personal Estate.

Omit altogether the exception of the ship Bombay which is repeated again in the page following. 2d Page, bottom line.

Omit altogether the occupation of the house at Bellabeg by my niece Christian Stuart (since deceased) and place the provision for her daughter and son in its proper place. 3d Page.

Eleven lines in this page as marked thus " to be omitted as unnecessary, as the individuals referred to in it are all of age. 4th Page.

It being evident that three of the four nieces there alluded to are past the age of childbirth; it is my meaning that at their death, the principal sum from which they derive the annual income should be divided among the numbers of my great nieces that may be then alive, in place of making them my residuary legatees. 5th Page.

Two years wages to the servants that may 6th Page.

(a) This script was written on four sides of writing paper; the three first were signed by the deceased, the last was unsigned and not written to the end.

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Residue.

be living with me at the time of my death in place of one: and a legacy of two hundred pound to my coachman, and the same to my butler, in addition thereto.

The residue of my estate I bequeath to my executors in trust to make good and answer such legacies and remembrances to friends as I may nominate by a codicil to this my will when I can more particularly ascertain its amount, as at present it is liable to considerable diminution.

Lushington and ——— against the admission of this allegation.

Swabey and Phillimore in support of it.

JUDGMENT.

SIR JOHN NICHOLL.

The only question before the Court at present is, whether this allegation propounds such facts as will entitle it to be sent to proof.

In deciding on the admissibility of an allegation, it is the duty of the Court to govern itself by established principle; if the facts pleaded are such as would not entitle the paper to probate, then an end ought to be put to the cause: if on the other hand it sets forth such circumstances as if proved might by possibility establish it, the Court, especially in a case like this where expense is no object, would not prevent the parties from bringing all the circumstances to its view.

John Forbes executed a will on the 2d of May, 1820; the validity of that will is not in contest; when it was made, he enquired of his solicitor, Mr.

Hutchinson, whether any particular form of words would be requisite for the purpose of bequeathing legacies to relatives or friends, and was answered in the negative, as far as regarded absolute pecuniary bequests; and he then expressed his intention, to make himself at a future time a codicil containing bequests of that description;—the will itself also expressly reserves the power of giving legacies by a subsequent codicil. Upon this statement in the first article, it appears that it was still the intention of the testator to dispose of further legacies, and to do this by a subsequent codicil.

It is further pleaded, that on the 21st of June, 1821, he gave his solicitor paper B. for the purpose of making an entire new will. The solicitor told him that a codicil would be sufficient; and observing that the bequest of the residue was intended to be revoked, he asked him in what manner he wished it to go :” to which the deceased replied, “ to his executors,” adding, “ that he supposed that would be the effect of the expressions used by him in the instructions :” but Mr. Hutchinson did not commit the deceased’s explanation to writing. These instructions therefore in paper B. did not answer the intentions of the deceased. The third article states, that the deceased at the time was apparently in good health, and treated it as a subject to be proceeded on at Mr. Hutchinson’s leisure, and left paper B. with him to prepare a codicil from; finding it not necessary to make a new will, and not thinking it matter that pressed, nothing was finally settled. I do not see

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how, under this statement, paper B. can be regarded but as a paper which did not answer its purpose:—if so it will be impossible that B. can be pronounced for. My present impression therefore is, that B. cannot form any part of the probate. It may have another effect, it may serve as a proof of A.:—indeed in argument it has been contended that it has such an effect:—while on the other hand it has been contended to be a proof of the abandonment of that paper. It does not appear when B. was written,—it is confirmatory of A. in one respect, for it revokes the disposition of the residue in the will. It has been said, that it does not carry the intentions of the deceased into effect;—certainly it does not, but at least it does so far as it deprives his great nieces of the residue, which was his object;—and that residue being undisposed of would go to the next of kin, whom the law particularly favours. At the same time if this is not done according to the rules and principles of the Court, the mere object of arriving a little nearer to the intention would not induce me to admit it.

It has been argued that B. is an abandonment of A.: I have already stated my impression, that they were not intended to clash with each other;—there is no inconsistency in his adhering to A., after his conversation with his solicitor respecting B. His intention then was, not to have a new will, but to have his alterations in the form of a codicil. I cannot consider B. as evidence of his departure from A.; if it were otherwise however in this important case, I should allow all the allegation to go to proof.

The question therefore is, whether A. under the circumstances pleaded could receive probate.

Whether on the face of the paper it is finished or unfinished, perhaps it is not necessary to decide. Possibly I might think that it is in a state that would leave it open to evidence : but it is a different question whether connected with circumstances, particularly those which passed at the execution of this will, and referring to the will, and being all in his own handwriting, and nothing at the conclusion to shew that more was intended, and the deceased himself not considering it as a regular codicil, it might not be considered as a complete paper. But the case is not left to this consideration. The paper begins thus ;—“*In case of my inability to make a regular codicil to my will, made and published on the 2d of May, 1820, I desire the following to be taken as a codicil to, and as a further part of my said will.*” It is said that this is provisional and conditional : but the Court has in many instances decided, that it means no more than “till I make a regular will, so long I adhere to this paper.” At bottom of the first, second, and third pages he signs his name ;—he had not quite arrived at the bottom of the fourth page : it seems as if the paper was written at different times, from the different colour of the ink. The coachman and butler have legacies given them ; and it is said that a similar notice being taken of them in B., shews an abandonment of A. ;—to me it seems exactly the reverse, finding B. would not do, he afterwards adds to the other codicil ;—this it may be

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said is mere conjecture, but it is quite as good as the other conjecture.

Taking this paper under these circumstances, though not actually concluded, yet the signing at the bottom of several pages, goes pretty strongly to shew that he had made up his mind as far as it went.—Not being arrived at the bottom, he still kept it open in order to add from time to time any legacies he might wish to give; this is the natural construction, and slight evidence would satisfy my mind on this head.

Now what is pleaded in the fourth article could leave no doubt, “that the deceased was taken suddenly ill between nine and ten o’clock of the evening of the 20th of June, and died before the next morning;—that paper A. was found in the left side of his writing desk in the dining room, at which he usually wrote, and in which he kept his cash book and papers of value;—that James Mindenhall the butler, going into his master’s room to see if he wanted any thing, did on the forenoon of the day of the deceased’s death, on entering the room, see the deceased sitting at the aforesaid desk, employed in writing;—that he went near enough to see that he had before him a paper written almost all over, of the size of a sheet of foolscap paper, and folded in the manner such paper usually is when it is written book-ways; and the deceased on being interrupted, folded up the paper and put it into the left side of the desk; and that when the desk was searched after his decease, there was not any paper found in it which answered the description of that

on which the butler saw the deceased writing, except the paper marked A." This description, as far as it goes, identifies the paper. It has been said, that these circumstances will not be sufficient to identify the paper;—I cannot anticipate what the evidence will be, but I must assume these facts to be true for the purpose of this discussion; and if a witness, beyond all exception, states these circumstances in a credible manner, it will, I think, bring up the case to the highest demand of the requisites called for by this Court:—on the most strict interpretation of our rules, it would be entitled to probate.

Under all these circumstances, I shall allow the whole allegation to go to proof.

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Six witnesses were examined in support of this allegation, *viz.*:—Julius Hutchinson, the Solicitor; Thomas Hodgson Holdsworth, his clerk; Thomas Wilkinson, John Forbes Mitchell, Alexander Gray and James Mindenhall the deceased's butler.

JUDGMENT.

SIR JOHN NICHOLL.

In this case I have no sort of doubt. Two papers are propounded as codicils to the will of John Forbes; and though the Court went a good deal into the question, when the admissibility of the allegation was discussed: yet in a case of property of this magnitude, and where minors are concerned, I shall examine the question in detail, and with some degree of minuteness.

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The magnitude of the property does not vary the principles on which the question is to be decided. Cases of imperfect papers occur so frequently in these Courts, and the principles on which they turn are so familiar to us, that it is almost unnecessary to state them : yet it may be a satisfaction to the parties ; and it is useful for the public, that the Court should from time to time repeat and enforce those principles.

If a paper on the face of it is in legal construction imperfect and unfinished, evidence of intention is let in, and must be gone into ; and it may be shewn, either that the deceased abandoned the intention he once had of giving effect to the paper, or that he was in progress towards finishing it, and only prevented by the act of God from completing it. The presumption is against an imperfect paper, and the burthen of proof against the party setting it up ;—but the degree of presumption varies according to the state of imperfection in which the paper presents itself. In some instances it is so completely a mere memorandum, that proof of intention cannot be made but by strong extrinsic circumstances ; in other cases it is so nearly perfect—it has on the face of it such strong indications of testamentary intention, that slight circumstances are sufficient to outweigh the presumption against it. It may happen in some instances, that it is a matter of legal doubt from the force of the instrument. A disposition of personal property in the handwriting of the deceased, requires no formality to give it effect, if none is intended by the writer.

Paper A. professes to be a codicil to a regular will;—it is described as a codicil,—it is all in the handwriting of the deceased; at the bottom of three sides of the paper the deceased has signed his name; at the bottom of the fourth sheet, which is not finished, he has not signed his name.

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On the face of the instrument the Court is of opinion, that in legal construction and rational interpretation, it is imperfect and unfinished;—and that evidence of intention must be gone into, either to shew that he intended it to operate in its present form, or that he was prevented from finishing it by the act of God. The amount of the evidence required must depend, not on one circumstance or one witness, but upon all the circumstances taken together.

The deceased lived in Fitzroy Square,—he died suddenly at nearly seventy-eight years of age, left a fortune amounting to 350,000*l.*, which he had acquired as a merchant;—his relations entitled in distribution were, a sister and several nephews and nieces;—his extrinsic relations were great nephews and great nieces, and he had a number of friends. He made arrangements for the distribution of his real estates in Scotland in 1816;—in May, 1820, he executed a long and formal will, disposing of considerable property, and appointing his executors trustees for the residue, which he bequeathed to his great nieces, intending to give further legacies as appears by a reservation in the residuary clause itself; this intention however does not depend on the formal(*a*) reservation in the residuary clause: the

(*a*) The reservation was thus expressed:—"And as to all the rest, residue, and remainder, of my personal estate and

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deceased intimated his intention of making such a codicil to Mr. Hutchinson his Solicitor, on the day he executed his will.

This evidence lays a strong foundation of probability of intention, as to any codicil appearing in the handwriting of the deceased on his death. On the 30th of June, ten days after his death, his friends met at his house, and the clause in page nine of the will attracting their attention, and something also mentioned by James Mindenhall, the confidential servant of the deceased, induced them to search for a codicil :—they found it in a repository. But when had the deceased last a reference to this paper? incontestably within a few hours of his death ; not only it was found uppermost in his desk, but it was lying on his banker's book, it must have been placed there after he had had recourse to his banker's book, in which he had that very morning entered the check he had given to Mr. Gray for 600*l.*—which check bears date the same day : so that on the very day of his death he had made this entry. Paper A. is loosely put upon it, so that it must have been in his hands when he used the book. There is no reason whatever to doubt the correctness of the facts.—In the afternoon of that day, the deceased was better than he had been for some days : but about nine o'clock in the morning as he was coming out of the watercloset, he was suddenly struck with death, and expired within an hour.

effects, whatsoever and wheresoever, not hereinbefore otherwise specifically bequeathed or disposed of, (except such part or parts thereof, as I shall or may give or dispose of by any codicil or codicils to this my will) give and bequeath the same," &c.

Under these circumstances is there the least reason to presume, that there was an abandonment of this paper, and not a continuance of intention which was only prevented by the act of God?

Another paper marked B. is propounded, which was delivered to his Solicitor on the 12th of June; it is argued that this shews an abandonment of A.; but the whole of B. is not of the character of the codicil the deceased proposed to make; B. was for the purpose of making alterations in the will itself, not to substitute any papers in the place of A. This is the necessary construction that must be put upon B.,—the will was to be re-drawn to contain these alterations. There could not be the least inconsistency in adhering to A. and to B. The deceased does not shew the slightest departure from his intention; when he comes to his Solicitor he finds it not necessary to have a new will, but that a codicil would leave him at full liberty. It is dated March, 1821. It begins with stating, “that in case of his inability to make a regular codicil to his will, (made and published on the 2d of May, 1820,) he desires the following to be taken as a codicil to, and as a further part of his said will.

I cannot admit this to be a conditional codicil as pressed in argument.

The next clause relates to the residue;—it has been observed that this alteration was not communicated to his solicitor: but if the intention occurred, it is not improbable that he thought himself incompetent to such an alteration of his personal property; at the bottom of the first page he subscribes his name,—the same on the two next; he

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continues legacies on the fourth, but not quite to the bottom, and to that he does not sign his name.

What is the rational inference from this? that by signing at the bottom to the three first pages, he had so far made up his mind;—it is not a deliberative memorandum;—he means by signing it to give it a greater degree of authenticity. Secondly, In going on and not reaching the bottom of the fourth page, the inference arises, that the paper is still in progress; and when I understand that he has only given about 30,000*l.* out of 130,000*l.* to which the residue amounted, the probability is, that he was deliberating, not as to what he had written, but as to what further he should give; this is confirmed by the appearance of the instrument. If my eye does not deceive me, several legacies are written at different times; some are rather in a different character of handwriting from the preceding bequest; the last legacy of all seems written in a different character, and with a different pen and ink.

This being the appearance of the paper so conformable to the codicil he had declared his intention of making when he made his will, though not finally completed, it has every appearance of intention that he meant to complete it; and I will not say that sudden death alone, and its being found in his repository, would not have been sufficient to entitle it to probate. But there is much further evidence;—how is it found? it was his habit to write at a desk in the dining parlour, and his habit when interrupted to put papers at which he was writing into that desk; the evidence of Mr. Williams, of Mr. Gray, and Mr. Holdsworth, goes to shew that on

opening this desk this paper was found uppermost in it:—it is found exactly in the situation which leads to the confirmation of the inference; he wished the will of 1820 to continue as his will subject to these considerations. Mr. Hutchinson's evidence is complete.

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The evidence and this paper lead me to draw these conclusions.

First. That when he carried B. to his Solicitor to have a new will made from it, he had not the slightest intention of suspending A.

Secondly. That after his conversation with Mr. Hutchinson, he adopted the suggestion of a codicil only, on the principle that no new will was necessary to make the alterations he proposed.

Thirdly. That this evidence comes out stronger than I had expected from the allegation, to shew that the directions given by the deceased were final; and the deceased having left his Solicitor with full instructions to prepare the instrument, I apprehend by every rule of this Court the instructions are valid,—remaining with the Solicitor it was owing to his act alone, that the formal codicil was not prepared before the intervention of death.

What may be the effect of this codicil this Court cannot enquire into,—it belongs to a Court of construction to do this. It is said the Court of construction cannot carry the intention of the deceased into execution; but there is no reason why if it should be so, in every other respect, the paper as far as it can be corroborated, shall not be carried into effect; the very clause in B.

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respecting the residue, is a strong corroboration of A.

Indeed with respect to A., I see no reason to doubt that he was employed on that paper on the day of his death, for there is no doubt of the identity of the paper. Whether he added to it or not on that day, there is no direct evidence :—but the fair result of all the evidence is, that he did. On Tuesday Mindenhall swears he saw him employed on this paper,—he saw him with the pen in his hand. It is fully proved to me, that on Wednesday he had this paper under his consideration : the circumstances all tend to the same conclusion. Forbes Mitchell strongly corroborates Mindenhall, and says, that when the paper was first discovered there was a degree of freshness in the writing and colour of the ink which was passed away. We very well know, that when ink is exposed to the air it becomes considerably blacker ; his observation therefore, does not apply to the present state of the paper, though there is still some difference in the appearance of the last sentence.

The whole of the evidence establishes the fact, that the intention of the deceased went with this paper till his death :—that it was in progress ;—and that the final completion of it was prevented by the intervention of death.

I have no doubt or difficulty in the case. The Court has been admonished of the necessity of adhering to its principles. No person can feel more strongly than I do the necessity of adhering to them : but to pronounce for these papers, will be no departure from the strictest principles which

have at any time governed the Court. Whereas on the contrary, to reject these papers would be to violate the most established rules, and to defeat the intention of the testator. Indeed if I were to do so, I do not see how after this, any imperfect paper could be carried into effect.

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JONES v. BEYTAGH and BEYTAGH.

Nov. 21.

HENRY CUNIFFE died in 1810 leaving a will, in which John Wedderburn, Dominick Beytagh, and Henry Concannon, were appointed executors; and Dominick Beytagh, and Henry Concannon residuary legatees. These several persons all died without taking out any probate or administration.

Letters of administration which had been granted to the executor of a creditor, rescinded before they had passed the seal, at the suit of the executor of a residuary legatee.

On the 24th of May, 1815, letters of administration of the goods of Henry Cuniffe limited to substantiate proceedings in the Court of Chancery, were granted to John Williams the nominee of Mary Jones, widow. In January, 1817, letters of administration with the will annexed, of the rest of the goods of Henry Cuniffe were granted to Mary Jones as a creditor of the deceased.

In January, 1821, Mary Jones died. On the 2d of April, 1821, a decree issued against James Beytagh, and Edward Beytagh executors under the will of Dominick Beytagh, calling upon them

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to accept or refuse letters of the goods of Henry Cuniffe left unadministered by Mary Jones, or shew cause why the same should not be granted to Frederick Jones, the son and executor of the said Mary Jones. This decree was served on the executors, James Beytagh and Edward Beytagh on the 10th of April, and returned into Court on the 9th of May. And on the 16th of May no appearance being given for the executors, letters of administration were decreed to Frederick Jones; when however they were taken to be sealed, a caveat was found to have been entered in the seal-book against them.

An appearance was now given for the executors of Dominick Beytagh, and the Court was called upon to rescind the letters of administration.

Janner for the executors.

By a misapprehension of the solicitor, directions were given to the proctor to enter a caveat instead of to oppose the grant of the letters of administration to Frederick Jones. This caveat was entered on the 9th of May, and the parties in Ireland had no knowledge of the proceedings till the letters of administration were granted. As they have not passed the seal, the Court cannot hesitate to rescind the decree. Letters of administration are the right of the representative of the residuary legatee;—practice has made this the law of the Court.

Swabey and Phillimore contra, for Mr. Frederick Jones.

The grant is discretionary with the Court. Our parties have been put to great expense and inconvenience and the executors cannot be heard to

over the laches of their own agent as an excuse for having suffered the proceedings to go on so long unopposed.

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The Court rescinded the decree, and granted the administration to the representative of the residuary legatee, on his paying the expences incurred in taking out the decree.

GODDARD v. CRESSONIER otherwise GODDARD.

Nov. 27.

MARIA GODDARD died in the department of Oise in France in August, 1808, intestate leaving a widow. Application was now made for administration by the next of kin. The widow was stated to be resident in France,—a notice had been served in the usual manner on the Royal Exchange.

Per Curiam.

It must be understood that where the person entitled to an administration is resident in France, the Court will expect something more than a service on the Royal Exchange. It will expect that due diligence shall be used to apprise him of the application.

When a person entitled to an administration is resident abroad, the Court will expect due notice to be given to him before it grants administration to another party.

The mere service of the decree on the Royal Exchange will not be sufficient.



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ARCHES COURT OF CANTERBURY.

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Dec. 1.

LEE and PARKER *v.* CHALCRAFT.

Appeal from the Consistory Court of Winchester.

JUDGMENT.

SIR JOHN NICHOLL.

Church-rate
not proved to
be unequally
laid.

This is an appeal from the Consistory Court of Winchester, brought by the Churchwardens of Headley against John Chalcraft for subtraction of two church rates, one of one, the other of two shillings in the pound ; the libel was admitted in August 1818 ; an allegation was given in by Chalcraft, in which he pleads that the rates were unequal, that Chalcraft is rated higher than others, and particularly than Parker. Four witnesses were produced on this allegation in July 1819, but they were not examined till January 1821. Chalcraft has ex-

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amined witnesses, and thereby pointed out the true point at issue; (a) the churchwardens produced witnesses on the third article of their libel as it is said, indeed I don't see on what other plea this could be produced; but it was quite evident what the question at issue was. Eight witnesses were ex-

(a) ARCHES COURT OF CANTERBURY.

THOMPSON and SANDFORD v. COOPER.

An Appeal from the Dean and Chapter of St. Pauls.

1799.
Easter
Term.
April 24.

Sir John Nicholl against the rate.

This is to be determined as a poor rate. If one person is omitted enough is proved, and the rate ought to be quashed not amended.

The King v. St. Catharine's Gloucester; Douglas 626. The King v. Sandwich, Douglas 541. The King v. Redden, 1 T. R. 625.

JUDGMENT.

SIR W. WYNNE.

A church rate resisted on the ground of inequality.—Objection overruled and the rate confirmed.

This is a business of confirming a church rate for the parish of Chiswick, commenced in the Court of the Dean and Chapter of St. Pauls, in whose jurisdiction Chiswick is. The rate is dated the 7th November, 1793;—the churchwardens prayed confirmation of it;—a caveat was entered;—Joseph Cooper a parishioner appeared and objected to the rate;—an allegation was brought in and admitted, and reformed on the 17th of May, 1794;—a long time has been taken in the proof,—they were not assigned to prove all facts till January, 1796; what was the reason of this delay is not explained,—it is to be lamented in any cause, especially in such a one as this; but it has been truly said, that is not to be objected to one party only—it could not have stood so long if pressed. It is asserted that it was to give another allegation, and when given, that depended long before the Judge below gave his final opinion. On the bye day of

amined,—the cause came on for hearing—and the Court pronounced that the churchwardens had wholly failed in the proof of their libel. I am of

Trinity Term, 1797, it was admitted being first reformed. An appeal was brought. The Court was of opinion that some facts alleged were new;—that in the new church rate there were different valuations; and that it was necessary to see how the churchwardens had conducted themselves. Many witnesses have been examined, ten on one plea, thirteen on the other. Interrogatories have been administered, but no allegation has been given in by the churchwardens, they rest entirely on the observations to be made on the proofs produced. It is extraordinary that it should be made matter of complaint, that the cause should be heard on the party's own evidence.—Out of thirteen special objections the counsel give up six, they rest on specific objections to six and on some general objections.

The first article pleads generally that the rate is unequally made—this is a truism, it must be equally made—no law is required—reason shews it must be so. The way to prove it will depend on the opinion and judgment of the witnesses they examine; and they are their own witnesses;—there are only two, and one only of those is a parishioner, who think the rate unequal. Thirteen of their own witnesses verily believe that the churchwardens and parishioners have framed the rate in an equal manner according to the best of their judgment, and that was it considered as proper and reasonable by all except by Cooper and Perry. There was an appeal by Cooper against the poor rate, in conformity to which this rate was made—it failed, the rate was confirmed, and he was condemned in 20*l.* costs.

It is objected that it does not appear whether the objection was taken by Cooper, certainly it does not: but there is a strong presumption, if there were two rates made conformably to each other, and apparently made by the same party, and he brought so much evidence that he made the case as strong as he could—if this were the same objection of inequality, it is hardly to be supposed that he would not take it.

Secondly, It is stated that divers parishioners were not assessed at all, though they were not paupers and rented premises

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opinion that the objection pressed, as to their having been no appeal, is not substantiated; and that the inhibition having been taken out within ten

of from 10*l.* to 13*l. per annum*. It is objected that it is clear in law that the parishioners have no power to make exemption; stating two cases, *The King v. St. Catharines, Gloucester*, and another to shew it will void a poor rate. Most undoubtedly, *prima facie* the omission of a person bound to pay, makes an unequal rate. It is broadly laid down I suppose in the report, that the person omitted is equally liable to pay as another:—but does it appear that it was ever laid down, that no person on any account may be omitted because he is poor? Would it be to consult the interest of the parish by so doing? The evidence shews that they always have omitted persons not parishioners, not renting to the value of 10*l.* having many non-parishioners resident to cultivate garden ground who would be made parishioners. We are not to consider the policy or the humanity of the rule, but whether the parish may make such a rule for the advantage of the parish, for it may be prudent and for the benefit of the parish—it was not taken up on this occasion—it had been used for fourteen years—if they have a right to make such a rule and I see no law against it, I think from what is said of the rule here, that the church rate made according to the poor rate is just and prudent;—but it is true also that the decisions applying to poor rates at common law, are not binding in cases of church rate. The poor rates are a great, heavy, and constant charge, church rates are not so—they are seldom heavy, and there is no reason to be so precise respecting them. If there is an inaccuracy, and the Court sees nothing done out of partiality, or by which the parties are materially injured, it would not quash the rate. But the rule here I take to be perfectly legal and prudent.

How then do they prove that persons are omitted who ought to be rated?

Manham says he is a journeyman carpenter, rents to the value of six guineas, and is able and willing to pay, but it is shewn that he is a parishioner of Harrow and is within the rule.

Walham is within the same rule, he has specified several but

days, which I am afraid is the practice, may be considered, together with the protest of appealing, as equivalent to an appeal.

does not attempt to prove any rent to any value. The witnesses are under-tenants—all poor—some receive donations from the parish—they are not capable of paying. Then this general article is done away with for none are not rated who should be under the rule mentioned.

Penny's charge is next.—Perry, who is not an inhabitant, would give more—he means in his opinion—Penny says he cannot speak with certainty—he thinks he was assessed at 30*l.* but raised to 40*l.* by the commissioners of the land-tax—he appealed, but could not obtain relief—as the commissioners said this could not reduce his assessment unless there was a reduction in the parish rates. They reduced theirs, and then the commissioners reduced their rate.

Thus he was rated at 40*l.*, but obtained a reduction from the commissioners of the land-tax. They were responsible, and did not act without caution, but took the assessment of the parishioners as good ground to go upon. Has the Court then any ground to say that this is not a fair assessment, or that the parishioners would have altered it, if there had been no ground to go upon? It is a strong affirmance of the opinion the commissioners entertained if the parishioners acted upon it. This objection is, I think, completely refuted.

As to Sich and Co. who are Brewers, they are rated for very considerable premises at 182*l.*, it is said the value is 224*l.* The evidence in support of this is Clark, who says that at the time mentioned they were so rated, being charged amongst others for Fosley's tenement: but in the rate it is shewn that Fosley himself is rated—he was assessed 197*l.* to the other rate, which is further confirmation that the tenement was not then in the possession of Sich and Co. Sich gives an account of the manner in which he gave in his premises to the vestry; the principal objection was, that part was rated at 30*l.* instead of 46*l.* The answer is that 42*l.* was in part—that it was inhabited by poor persons, who being assessed, the parish found it difficult to get the rates: he therefore undertook to pay at the rate of 30*l.*

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With respect to the other preliminary objections, it is the rule of the Court in all appeals from the country jurisdictions, to endeavour to get at the substantial justice of the case, at least in all questions which regard a civil right; in criminal cases it may be otherwise. If we were not to admit the irregularities which take place in the Courts below, the plaintiff could hardly ever succeed in obtaining justice before this tribunal.

for them;—both he and the minister say that the arrangement was fair and profitable for the parish.

It is objected that in the poor rates the occupiers must be rated, or they cannot see the circumstances of the case, and there may be ground for collusion. Supposing that in no case the poor rates could be so assessed, the rule would not apply so strictly to church-rates; but that the parishioners assembled in vestry, if they see it advantageous, may not accept such an offer there can be no rule:—there is no reason why they should accept it, if it is not an advantage—the vestry determined it to be so, and I think with good right, and that it was for the benefit of the parish.

There is no ground for the objection as to Sich.

It is said that Armstrong is rated at 66*l*., whereas the value is 70*l*.—Perry states as he does to the other article, that he would give more.—Wood is assessed to the house tax; the assessment is 70*l*.—Armstrong says he has been a parishioner ten years—he bought an old house, which was assessed at 24*l*.—he built more, it was then assessed at 50*l*. or 51*l*. up to 1791, with a malt-house at 15*l*.; it was so assessed till Cooper became assessor of the land tax, and it was then assessed at 70*l*. for the house, though the malt-house was taken down:—he appealed to the vestry—they reduced the assessment to 65*l*.—he was raised afterwards to 76*l*.—and was reduced on an appeal to 66*l*., and so assessed to the parochial taxes—he was afterwards assessed 70*l*. to the house tax, but did not think the object worth appealing.

In the present case the true point is the unequal rating of the defendant, if he *can* make out that he was unjustly rated he will be entitled to the pro-

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Trebeck thinks he was fully rated. Williams says he was so rated at 66*l.* but then that there was a difference between this rate, and an assessment to the King's Taxes; but is there ground for the Court to say, because he was rated higher to the King's taxes, therefore the parish is wrong? I think they are better judges, and have perfect grounds to abide by their assessment.

Simpkin is said to be rated at 110*l.*, instead of 150*l.* Perry would give 150*l.* Simpkin himself states the facts. The premises were let to Sir Francis Buller who quitted them because the rent was too high. For nine months he endeavoured to get a tenant at 120*l.* or 110*l.* No one would offer more than 100*l.*, and that for a boarding school. He then pulled down many large rooms and stabling for twelve horses, not as improvements; the court wall was rebuilt, for it fell down. He was assessed higher; he applied for relief, and the parish and the commissioners relieved him, paying 140*l.* for one year, which he was advised to do, and not to stand out. He did go himself and desire to be rated at 120*l.* because Sir Francis Buller was so rated, and would not have it said that he stood out and objected: but he swears that at that time the value was not more than 110*l.* which he could not get.

Whitham was surcharged by the assessors to the house tax. Whitham gives an account of what passed at the vestry when he was assessed. He was assessed at 18*l.* 10*s.* Settled at vestry at 28*l.* In 1792 he was assessed at 45*l.* He meant to appeal, but was prevented by illness. In 1793 he was assessed at 63*l.*; he appealed, but was not relieved; he attended at vestry—was put to question, and it was agreed that 45*l.* was a fair rate. He was so rated—he appealed again, and was reduced. Then the opinion of the parish is confirmed by the collector of the land-tax, which is sufficient for the Court to say that the objection is not proved.

De Volle is assessed at 30*l.*, 16*l.* for new stables, 8*l.* for grounds, these they plead to be of greater value. Besides the rent, 1,500*l.* was paid for the surrender of a lease and improve-

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tection of the law. No answers are given in by him to the libel ; instead of answers he gives an allegation, which I must consider *loco responsi*, in

ments, and to conceal the true value and screen it from the assessors ; the consideration was not to be inserted in the assessment : but by the advice and contrivance of Thompson it has been omitted and added to the appraisalment of stock.

The new stables are stated to be of greater value ; three witnesses have been examined as to this. Mary Atkins wife of the former occupant says, she believes 30*l.* was reserved—she has no knowledge that 1,500*l.* has been paid, an appraisalment of stock, &c. was made, and it was understood that 1500*l.* was paid which he received, but she understood that he gave part of it back. George Taylor who appraised the stock knows nothing of the 1,500*l.* There could hardly be a lease out in two years, therefore the fact of the 1,500*l.* is not proved ; mere invention according to the evidence. That it was let for 30*l.* is proved when the rate was made ; 42*l.* was paid afterwards : but could the parties foresee this ? they had no grounds to consider it worth more than 30*l.*

With respect to the new stables there is much confusion, and witnesses do not seem clearly to understand it—all prove that they understood this same piece of land was let for 10*l.* It seems taken for granted he held the whole of the large stables ; whereas it is clearly proved that he never did ; he was at some time in possession of part, for which they suppose he paid 18*l.* ; two other witnesses say that it was not to their knowledge in his possession then ; how it appeared to the vestry they cannot tell ; they have not produced De Volle, if they had, or any person present at vestry, it probably would have appeared. But there is no ground to pronounce that it was not a fair assessment, which was made by persons who appear to have acted with as much care and caution as the parishioners appear to have done, weighing all the circumstances which came before them.

As to the charge against Thompson of concealment, there is no proof of it whatever. I do think myself bound to pronounce on this objection as on the others, that it is utterly unfounded.

which he recites the making of the rate, indeed even his own witnesses authenticate this by speaking to the handwriting of the persons signing it. The point therefore pressed as to there being no proof of the existence of the rate, or of the churchwardens being duly elected, is answered by this.

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On both sides they produce witnesses simply confined to the question, whether the party has been unduly rated, that is, whether Chalcraft is comparatively rated more than Parker or the other parishioners. In such a case as this, I must take the presumption to be in favour of the rate, that it was necessary for the repairs of the church, and that it was generally equal, otherwise the minister and inhabitants would not have signed it.

The assessment of the parishioners to a rate of this description, is the very object of their meeting in vestry. They assemble there with their minister at their head, to consider this question. If Chalcraft did not resort to the vestry in the first instance, he neglected his duty; every person liable to be assessed ought to attend at the vestry.

This then is the case:—This gentleman has taken upon himself to enter into the suit, not as injured himself, but on general objections on which it ought not to be considered; it appears that the parishioners in general, except himself and one or two more, are satisfied, and have reason to be satisfied, as they endeavoured to make the rate justly. I will not say that the opinion of the parishioners is a bar to the objections of any individual:—but an individual who undertakes to make objections in such a case must be sure of his ground, and must prove his objections. In this case he has failed in his proof; and I should not do justice if I did not decree that he should pay the expences which the parish have incurred in the defence of this suit.

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Two rates are made by different assessments, and all I find is, that this person has not paid his rate. It is said that the rate appears in many instances unequal: but it is in a slight degree; and if some witnesses are correct, this individual is the person who has been under-assessed;—and we know that a parish will frequently under-assess an individual who is disposed to be litigious. If the rate is, as has been argued, generally unequal, the proper mode would have been to have entered a caveat against it. The practice of applying to the ordinary to confirm a rate is unfortunately often omitted. I must presume the rate was regularly enforced. The objection raised in the plea is not to the rate generally: but to the rating of this individual. The allegation itself takes an odd course, not that it was an unequal pound rate, or that his land was not worked according to the value of the rate taken: but that it is rated at less than Parker's, because one is rated at 13s. the other at 8s. 6d. an acre, the rate is not a correct rate; he should have brought evidence to shew what his farm was worth an acre, and what the other's farm was worth. As it is, he proves nothing. The number of acres is no proof of the annual value of the farm. As it is here stated, one farm seems to have had two, while Parker's had 92 acres of furze land. Independently of that, the evidence is only of the actual value in 1820, that is no proof of the actual value in 1813 or in 1818. One farm may have improved, and waste land may have been brought into cultivation, the other may be worn out or new land. Chalcraft's two farms are rated at

85*l. per annum*, and stated to be about 135 acres. There is no attempt to prove they are not worth so much ; nor any attempt to shew that the sum Chalcraft is called upon to pay is larger than his proportion ought to be to the general burthens of the parish ; but the objection is confined to one point, that he is charged at a higher rate than Parker, or that Parker was under-assessed ; a ground of this kind must be most clearly made out to sustain the objection. It would be hardly possible to enforce any rate, if a person of a litigious spirit can select some one individual and say, I am rated at more than that individual, in such a case the defendant must make out the inequality in the clearest manner possible. The defendant has produced four witnesses to shew that he was comparatively over-rated : but their evidence goes to their opinion merely. On the other hand, eight witnesses are produced by the churchwardens who are decidedly of a different opinion. And the Court is called upon to fix its judgment on the few against the many. It is said they are persons of greater skill ; and generally it must be admitted persons of skill will outweigh numbers. It is said one of them is a surveyor ;—and I perceive he describes himself as a yeoman and a surveyor. I find on the other side a witness of the name of Harrison, who describes himself as having been for twenty years in the habit of valuing land ; and I do not know why his opinion should not be as good as that of a professed surveyor. There is no ground on which I can sufficiently rely that one should outweigh the other. Opinions are against opinions. Eight as-

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sent, four dissent; the weight of evidence is rather on the other side. The defendant has produced another piece of evidence, if evidence it can be called; how it got into the cause does not appear; viz. a poor's rate, in which it appears that Chalcraft was lowered from 85*l.* to 80*l.* *per annum*, and Parker raised from 170*l.* to 175*l.*, this is no proof to me of a difference of value; they might have been lowered for peace or for a satisfactory compromise. But this assessment to the poor rate was in 1820, and furnishes no proof of inequality in 1813 or 1818: this *ex post facto* rate therefore, will not establish the inequality of the two rates sued for.

I am of opinion that the defendant has failed in his allegation; and the result of the evidence has satisfied me, that the rate was honestly and fairly made; and that the defendant not being able to justify the subtraction, the churchwardens are entitled to a sentence in their favour: I think that the Judge of the Court below did wrong; and that I am bound to protect the parish officers. On public grounds therefore I give costs against Chalcraft: but at the same time, for the sake of harmony, I should recommend the parish to enter into an arrangement with him respecting the expences.

AN

I N D E X

TO THE

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